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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 595

SWIFT AND COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED SEPTEMBER 9, 1941.



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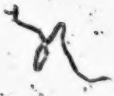
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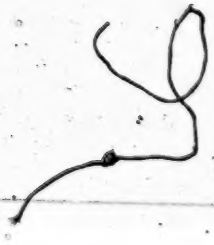
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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION, NORTHERN DISTRICT OF ILLINOIS

Civil Action, File No. 2188

SWIFT AND COMPANY and OMAHA PACKING COMPANY

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

COMPLAINT—Filed October 7, 1940

1. Plaintiff, Swift and Company, is a corporation organized and existing under the laws of the state of Illinois, with principal office and place of business at Chicago, Ill.

2. Plaintiff, Omaha Packing Company, is a corporation organized and existing under the laws of the state of Kentucky, with principal office and place of business at Chicago, Ill.

3. This complaint is brought to enjoin, set aside, and annul a certain report and order of the Interstate Commerce Commission, known on the records of said Commission as "No. 27862, *Swift & Co.* v. *Alton R. Co.*," 238 I. C. C. 179.

[fol. 5] 4. The complaint is brought against the United States and the Interstate Commerce Commission and the jurisdiction of this court is conferred pursuant to U. S. C. A. tit. 28, §§ 41 (27), 41 (28), 43, 44, 45, 45a, 46, 47, and 48.

5. On or about September 18, 1937, plaintiffs filed with the Interstate Commerce Commission (hereafter referred to as the "Commission") a complaint known upon the records of the Commission as docket No. 27862, *Swift and Co., et al.* v. *The Alton Railroad Co., et al.* A true and correct copy of said complaint is hereto attached, marked

exhibit "A", and made a part hereof. Answers to said complaint were duly filed with the Commission by the defendants named in said complaint, (hereinafter referred to as "said defendants"). Thereafter hearings were had before an examiner designated by the Commission. A proposed report was issued by said examiner and served upon the parties. Exceptions to said report of the examiner were filed by plaintiffs on or about March 30, 1939. Reply to said exceptions was filed on behalf of the said defendants. The case was orally argued before the entire Commission by counsel for plaintiffs and counsel for said defendants. On or about April 8, 1940, the Commission issued its report and order in said proceeding, known upon the records of the Commission as No. 27862, *Swift and Co., et al.* v. *Alton R. Co., et al.*, 238 I. C. C. 179. A true and correct copy of said report and order of the Commission is hereto attached, marked exhibit "B", and made a part hereof. The order of the Commission dismissed the complaint. Thereafter, on or about May 21, 1940, plaintiffs filed with the Commission in said proceeding a petition for reargument, reconsideration, and reversal of the Commission's order. A reply thereto was filed by counsel for said defendants. On July 8, 1940, the entire Commission entered an order in which it dismissed plaintiffs' petition for reargument, reconsideration, [fol. 6] and reversal of the order theretofore made. A true and correct copy of said order of the Commission of July 8, 1940, is attached hereto, marked exhibit "C", and made a part hereof.

6. The authority of the Commission with respect to the issues involved in said complaint No. 27862, during all of the period when said complaint was pending before the Commission, is solely contained in and is limited to what is commonly known as the Interstate Commerce Act, part I (U. S. C. A. tit. 49, § 1).

7. Said report and order of the Commission is erroneous, in violation of the provisions of the Interstate Commerce Act, part I (U. S. C. A. tit. 49, § 1), and other laws of the United States. Said report and order of the Commission is void and of no effect because it is based upon findings of fact which are not supported by the evidence of record, are irrelevant to any issue herein, and upon substantial and controlling errors of law. Said erroneous report and order of the Commission subjects plaintiffs to the payment of

charges which are unlawful, unjust, and unreasonable because it denies to plaintiffs, contrary to law, the right to obtain from said defendants possession of direct shipments of live stock at reasonably convenient, safe, and suitable chutes, pens, and ways, and denies to plaintiffs egress for removal of such live stock from the unloading pens of said defendants on the property of The Union Stock Yard and Transit Company of Chicago to the nearest public street, or to plaintiff's packing plants, via the shortest or most convenient way, to be designated by said defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company, in excess of and in addition to the lawful published tariff rates, to the railroad unloading pens at said stock yards, and without the payment of any charges other than the lawful transportation charges [fol. 7] of said defendants for the transportation of such direct shipments from the origin point thereof to the Union Stock Yards in Chicago, as provided in the tariffs of said defendants filed with the Commission; and because it denies all further relief sought in said complaint in said docket No. 27862 (exhibit "A" hereto). Said report and order of the Commission is based upon numerous erroneous conclusions of law, is contrary to the provisions of the Interstate Commerce Act, part I (U. S. C. A. tit. 49, § 1), and other laws relating to the transportation and delivery of live stock. The failure of the Commission to decide said case in accordance with the facts of record and the law applicable thereto results in the payment by plaintiffs of unlawful rates and charges in order to obtain possession of plaintiffs' shipments of live stock consigned to plaintiffs at the Union Stock Yards in Chicago; and results in damage to plaintiffs in that, because of said erroneous and unlawful decision of the Commission, the plaintiffs are unable to obtain from said defendants possession of live stock consigned direct to them at the Union Stock Yards in Chicago except after payment of certain unlawful yardage charges as alleged in paragraph VI of exhibit "A" herein.

8. As a result of said erroneous decision of the Commission, plaintiffs are unable to obtain possession of direct shipments of live stock consigned to plaintiffs at the Union Stock Yards at Chicago, Ill., from said defendants, even by mere egress from said unloading pens to the nearest public street, and even though plaintiffs' own employees are at the unload-

ing pens of said defendants ready and willing to accept delivery of said direct shipments of live stock at said unloading pens and to remove them by the shortest egress to a public street, alley or other outlet, without payment of the yardage charges as alleged in paragraph VI of exhibit "A" hereto, in addition to the payment of the line haul freight [fol. 8] rates on said shipments duly published and filed with the Commission by said defendants and applicable to said shipments from points of origin on the lines of the defendants named in exhibit "A" hereto, to the unloading pens of said defendants for delivery at the Union Stock Yards in Chicago, Ill. That at the time of the filing of said complaint before the Commission plaintiffs had suffered damages in the sum of $17,500, and have continued to suffer further damages during the pendency of said complaint before the Commission and up to the present time.

9. That said decision of the Commission (exhibit "B" hereto) is based upon findings of fact which are unsupported by any evidence of record; is based upon findings of fact which are contrary to the evidence of record; is based upon findings of fact which are contrary to the weight of the evidence; is based upon findings of fact which are irrelevant to any issue in said case; is based upon conclusions of law which are contrary to the statutes and decisions governing the issues in said case; is arbitrary; exceeds the power of the Commission; is confiscatory of the property of plaintiffs; is without due process of law; and deprives plaintiffs of their property, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in the respects stated in the following paragraphs.

10. The Commission erred in the findings of fact quoted below (exhibit "B", p. 180):

"It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to re- [fol. 9] quire defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock

Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding."

11. The Commission erred in the findings of fact quoted below (exhibit "B", pp. 183-184):

"In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards, and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of complainant's property; and that payment of yardage charges to the Yard Com- [fol. 10] pany made to gain possession of its property would be made by complainant under protest.

"As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later,

in September 1935, the demands were repeated in letters sent to the defendants and were again refused."

12. The Commission erred in the following findings of fact and conclusions of law:

"The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge." (Exhibit "B", p. 189)

"Emphasis is placed by complainant on the provisions of the act which define 'transportation' and to the inclusion in that term of the word 'delivery,' and it is contended that our jurisdiction is coextensive with transportation as de- [fol. 11] fined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

"The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

"There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words 'delivery at public stockyards of inbound shipments into suitable pens' would have read 'into suitable pens and from those pens to the boundary of the stockyards.' The amendment indicates an intention by Congress to constitute the pens as the point where the duties of the defendants [fol. 12] terminate. The word 'suitable' is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards." (Exhibit "B", pp. 191-192)

"The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier, it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for un-

loading and by advocating the amendment to section 15, subsequently enacted.

[fol. 13] "The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

> I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.* (Emphasis supplied.)

"Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. (Emphasis supplied.)

"Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.

"Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers [fol. 14] since its enactment. When the amendment was proposed, the yardage charges had long been a matter of

concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard Company to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15 (5) could reasonably be given the meaning they now urge." (Exhibit "B", pp. 192-194.)

13. The Commission erred in the following findings of fact and conclusions of law (exhibit "B", pp. 195-196):

"The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term [fol. 15] transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

"The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant

and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own."

14. The Commission erred in the following findings of fact and law, and specifically in its denial of jurisdiction over services in connection with the delivery of livestock (exhibit "B", pp. 196-197):

"We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this report, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

[fol. 16] "We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

"The complaint will be dismissed."

15. The Commission erred in the following findings of fact and conclusions of law:

"A complaint containing issues substantially similar was considered by the Supreme Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which our order in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings." (Exhibit "B", p. 181.)

"Issues substantially similar to those here presented have been considered and decided in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co., supra*, and *Atchi-*

son, T. & S. F. Ry. Co. v. *United States, supra.* In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding and, in its opinion, stated:

Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section [fol. 17] 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

"It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

"The Court also found that section 15 (5) of the Interstate Commerce Act 'left undisturbed the Yard Company's practice of making a charge for livestock received,' and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

"Complainant here contends that the issue in this proceeding differs from that decided in the *Hygrade case;* that the complainant in the *Hygrade case* was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove ani-

mals from the unloading pens to the public streets. In the *Hygrade case* it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens." (Exhibit "B", pp. 189-190.)

"In the *Hygrade case* the Supreme Court stated that, [fol. 18] with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the *Hygrade case* it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the line-haul carriers ceased when the animals were placed in the unloading pens." (Exhibit "B", p. 196.)

"Reference is made by complainant to certain language of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that 'Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5).' In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. In either case, the property of the yard company must be used." (Exhibit "B", p. 191.)

[fol. 19] 16. The Commission erred in the following findings of fact and conclusions of law (exhibit "B", pp. 194-195):

"The first case, after the enactment of section 15 (5), in which the question was raised was *Southwestern Horse &*

Mule Assn. v. *A., T. & S. F. Ry. Co.*, *supra*. There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

"The other case in which an issue similar to the issue herein was considered was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, *supra*. There complainant's employees had taken possession of approximately 15 per cent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

"Since the decision of the Supreme Court in the *Hygrade case*, the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470; *Livestock to or from Union Stock Yards, Chicago*, 222 I. C. C. 765."

17. The Commission erred in the following findings of fact and conclusions of law and in giving weight to said alleged findings of fact quoted below (exhibit "B", p. 194):

[fol. 20] "The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5), the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 per cent of the voting stock. It also appears that on July

1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to."

18. The Commission erred in the following findings of fact and conclusions of law (exhibit "B", p. 195):

"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra; Union Stock Yards Co. of Omaha* v. *United States,* 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connec- [fol. 21] tion with egress for direct shipments consigned to packers are those prescribed by the Secretary."

19. The Commission erred in failing to describe, mention, or refer to the provisions of section 12 of schedule No. 10 of The Union Stock Yard and Transit Company of Chicago in effect at the time when said complaint was filed with the Commission by plaintiffs. If the Commission had made proper findings in connection with such evidence, it would have been necessary for the Commission to find that plaintiffs' shipments have been overcharged to the extent that they exceeded the railroad line haul rates plus $3.00 per car.

20. The Commission erred in failing to include in its report any reference to and in failing to give any weight to evidence of record offered by plaintiffs which shows that delivery of direct shipments of live stock to the consignee, without charge in excess of the published railroad tariff rates, where yardage service is not required or requested by the consignee, is provided at many important stock yards which are served by said defendants; and in failing to find that in one instance of this kind the practice

was prescribed by the Commission and in another instance is in accordance with a finding of the Commission.

21. The Commission erred in giving weight to the following finding of fact (exhibit "B", pp. 184-185):

"Because of the physical situation at the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company."

22. The Commission erred in the findings of fact quoted below (exhibit "B", pp. 180-181):

"Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company [fol. 22] through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of Swift & Company are at the unloading pens when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens is sufficient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture."

23. The Commission erred in admitting in evidence the testimony upon which it made the findings quoted below; in its findings upon said testimony; and in giving weight

to the findings stated by it as quoted below (exhibit "B", pp. 185-188):

"As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immedi- [fol. 23] ate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other, and Gustavus F. Swift and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

"Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

[fol. 24] "Since 1865, when the Yard Company began operations, there has been a line of demarcation between the

services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

"The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the 'Central Stock Yards,' near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings 'for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside [fol. 25] of the City of Chicago or directly consigned to them and thereby avoiding the payment of yardage charges' to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

"The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indi-

ana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; 'to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;' to guarantee that the Yard Company 'shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years,' and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its business at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

"The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company. [fol. 26] "It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

"The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants

from Chicago and that some arrangement must be made to hold them. It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

"The important fact is that, after the agreement of 1892 [fol. 27] expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

"The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct

shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an un- [fol. 28] limited period never to receive livestock in Chicago other than at the Union Stock Yards."

24. The Commission erred in the following findings of fact (exhibit "B", p. 189):

"Under the provisions of the applicable tariffs of individual railroad serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks."

25. The Commission erred in the findings of fact and in giving weight to said alleged findings of fact, quoted below (exhibit "B", p. 188):

"'The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture."

[fol. 29] 26. The Commission erred in the findings of fact and in giving weight to the findings of fact quoted below (exhibit "B", p. 189):

"In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

"An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 per cent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 per cent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 per cent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards."

27. The Commission erred in the following findings of fact (exhibit "B", p. 182):

"The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by [fol. 30] the Yard Company on every animal unloaded from railroad cars at the stockyards.

"With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments con-

signed to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold."

28. The Commission erred in its findings of fact and in giving weight to said erroneous findings as quoted below:

"Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motor truck over the streets in Chicago to complainant's plant." (Exhibit "B", p. 183)

"The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago." (Exhibit "B", p. 194)

29. But for the errors in findings of law and fact herein [fol. 31] alleged, and the denial by the Commission of its jurisdiction over the services here involved, the decision of the Commission would have been favorable to plaintiffs and the prayer of their complaint (exhibit "A") would have been granted in substance by the Commission. As a consequence of said erroneous findings of law and fact, and of the dismissal of the complaint, plaintiffs have been damaged, as aforesaid, by the failure of the Commission to require said defendants to perform their legal duty to plaintiffs in connection with the delivery of live stock to plaintiffs at the Union Stock Yard in Chicago, Ill. Except as provided in U. S. C. A. tit. 28, §§ 41 (27), 41 (28), 43, 44, 45, 45a, 46, 47, and 48, plaintiff is without any remedy at law or otherwise.

Wherefore, plaintiffs pray:

(1) That a writ of subpoena issue immediately out of and under the seal of this court, and be directed to said defendants, the United States of America and the Interstate Commerce Commission, requiring said defendants, on a day certain therein to be specified, to be and appear before this court and to answer this complaint, but not under oath, answer under oath being hereby expressly waived;

(2) That this court direct that due and proper notice of this complaint issue and be served forthwith, as prescribed in the act of October 22, 1913 (28 U. S. C. A. §§ 41 (28) and 43 to 48, inclusive);

(3) That a court constituted as required by said act of October 22, 1913 (28 U. S. C. A. § 47) be convened and that said court so constituted and convened shall hear this complaint upon due and legal notice to defendants;

(4) That upon the filing of this complaint, the judge of this court shall call to his assistance two other judges, one of whom shall be a circuit judge, to hear and determine this complaint;

[fol. 32] (5) That, upon final hearing of this complaint, the court so constituted shall enter a decree permanently suspending, enjoining, setting aside, and annulling the said order of said Commission; that this court shall determine and state the correct principles of law controlling the disposition of said complaint before the Commission; shall determine the jurisdiction of the Commission in the premses; and shall also determine what, if any, findings of fact in said decision of the Commission are erroneous, or irrelevant and immaterial to the disposition of the complaint before the Commission; and that this court shall thereupon remand said complaint to the Commission for further hearing and decision by the Commission in accordance with the controlling principles of law determined by this court; or find and determine that plaintiffs are entitled to a further hearing before the Commission and a decision therein not inconsistent with the decision of this court.

(6) That plaintiffs have and recover of the defendants the proper costs of this suit; and

(7) That the plaintiffs have such other and further relief in the premises as may be lawful and as may be deemed by this court to be fit and proper.

Edgar B. Kixmiller, Ross Dean Rynder, *Attorneys for Swift and Company and Omaha Packing Company,* 4115 Packers Avenue, Chicago, Illinois.

[fol. 33] EXHIBIT "A" TO COMPLAINT

[fol. 34] BEFORE THE INTERSTATE COMMERCE COMMISSION

SWIFT AND COMPANY, OMAHA PACKING COMPANY and G. H. Hammond Company,

v.

THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago and Eastern Illinois Railway Company (Charles M. Thomson, Trustee), Chicago and North Western Railway Company (Charles P. Megan, Trustee), Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company (Patrick H. Joyce and Luther M. Walter, Trustees), Chicago, Indianapolis and Louisville Railway Company (H. R. Kurrie and Holman D. Pettibone, Trustees), Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee), Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees), The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees), The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee), Erie Railroad Company, Grand Trunk Railway System (Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers: Canadian National Railway Company, The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee), Grand Trunk Rail-

way System (Lines west of Detroit and St. Clair Rivers), comprising the following carriers: Grand Trunk Western Railroad Company, Cincinnati, Saginaw and Mackinaw Rail Road Company (Grand Trunk Western Railroad Company, Lessee), Illinois Central Railroad Company, The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee), Minneapolis, St. Paul & Sault Ste. Marie Railway Company, The New York Central Railroad Company, The New York, Chicago [fol. 35] and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Wabash Railway Company and (Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers)

COMPLAINT

The complaint of the above named complainants respectfully shows:

I

That complainant, Swift and Company, is a corporation organized and existing under the laws of the state of Illinois, with principal office and place of business at Chicago, Ill.; that complainant, Omaha Packing Company, is a corporation organized and existing under the laws of the state of Kentucky, with principal office and place of business at Chicago, Ill.; that complainant, G. H. Hammond Company, is a corporation organized and existing under the laws of the state of Michigan, with principal office and place of business at Chicago, Ill. That Omaha Packing Company and G. H. Hammond Company are wholly owned subsidiaries of Swift and Company. That complainants are engaged in what is commonly known as the packing house business and that they operate packing plants for the processing of live stock in the city of Chicago, Ill., adjacent to the stock yards of The Union Stock Yard and Transit Company of Chicago.

[fol. 36] II

That the defendants above named are common carriers engaged in the transportation of property, wholly by railroad, between points in the state of Illinois and points in the states of Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Colorado, Kansas, Missouri, Oklahoma, Texas, Indiana, Ohio, and various other states in the United States, as their routes may run, and in connection

with other carrriers with whom said defendants participate in the through transportation of live stock, in carloads, from various points of origin throughout the United States to Chicago, Ill.; and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III

That in the transaction of their businesses during recent years complainants have shipped via the lines of railroad of the defendants herein, from various points of origin as above described, consigned to complainants at Union Stock Yards, Chicago, Ill., what are commonly known as "direct shipments" of live stock. By direct shipments of live stock are meant shipments as to which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignor in the bill of lading, shipping receipt, waybill, or other transportation documents issued by the de- [fol. 37] fendants at the several points of origin, and in which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignee of the shipments at Union Stock Yards, Chicago, Ill.; which are not purchased on the property of The Union Stock Yard and Transit Company of Chicago; and as to which no use by complainants is required or desired of services, facilities, or property of The Union Stock Yard and Transit Company of Chicago, except such as may be incident to the delivery of such shipments to the agents or employees of the complainants at said destination. Such direct shipments of live stock are generally shipments which have been purchased by one of complainants or one of its buyers at some point other than Chicago and have been consigned thence to one of complainants at Union Stock Yards, Chicago, Ill., over the lines of one or more of the defendants. Hereinafter the term "direct shipments" without further definition shall be understood to mean shipments of live stock as defined in this paragraph.

IV

By proper tariff publication, and by long usage and custom, defendants have constituted the Union Stock Yards in Chicago, Ill., as their terminal for the receipt and delivery

of live stock in Chicago, Ill. When direct shipments from points of origin as above described, consigned to one of complainants at Union Stock Yards, Chicago, Ill., have reached their terminus, the cars containing such live stock, [fol. 38] are, by defendants, placed along certain unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, said chute pens being upon the property of and owned by The Union Stock Yard and Transit Company of Chicago. That such direct shipments are then unloaded from said cars into said unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, by employees of The Union Stock Yard and Transit Company of Chicago, for compensation paid by defendants herein to The Union Stock Yard and Transit Company of Chicago.

V

In the ordinary course of business, after a direct shipment is unloaded from the car in which it has been transported, into one of the unloading pens of The Union Stock Yard and Transit Company of Chicago, such direct shipment is immediately taken by employees of the defendants' agent, The Union Stock Yard and Transit Company of Chicago, over the protest of complainants, as hereinafter set forth, to so-called holding pens, from which such direct shipment is permitted to be taken by complainants, their agents, or employees, out of the custody of defendants' agent, The Union Stock Yard and Transit Company of Chicago.

[fol. 39] VI

That said agent of defendants, The Union Stock Yard and Transit Company of Chicago, publishes and files with the Secretary of Agriculture (but not with the Commission) a schedule of charges (Amendment No. 3 to U. S. Y. & T. Co. No. 10) in which are named certain yardage charges which are follows:

Cattle	45 cents per head
Calves (400 lbs. or under)	35 cents per head
Hogs	15 cents per head
Sheep and/or goats	10 cents per head

That the charges per head recited in this section are denominated "yardage charges" and purport to cover serv-

ices rendered after transportation by defendants, under their line-haul rates, has been completed. That in fact, as applied to complainants' direct shipments, transportation under defendants' line-haul rates is not completed until said direct shipments are delivered to one of complainants and placed in its custody or until defendants have notified said complainant of the arrival of said direct shipments and afforded such complainant a reasonable time within which to take possession thereof and remove them from the custody of defendants or their said agent. That said yardage charges are improperly and unlawfully exacted from complainants in connection with the transportation service of said direct shipments as defined in section 1 (3) of the Interstate Commerce Act, before a lawful delivery of said direct shipments has been accorded to complainants by de- [fol. 40] fendants, and before complainants have been afforded an opportunity to obtain possession of said shipments.

VII

That complainants are unable to obtain delivery of their direct shipments from defendants, even by mere egress from said unloading pens to the nearest public street, and even though their own employees are at said unloading pens ready and willing to accept delivery of said direct shipments of live stock and to remove them by the shortest egress to a public street, without payment of the yardage charges recited in section VI hereof, in addition to the payment of the line-haul freight rates upon said direct shipments duly published and filed with the Commission and applicable to such direct shipments from said points of origin to the terminals of defendants for delivery of live stock at Union Stock Yards, Chicago, Ill.

VIII

That on or about May 9, 1933, complainant Swift and Company addressed a letter to each of the principal traffic officers of the defendants herein, in which said complainant stated, on behalf of itself and its said subsidiaries, that it was ready, willing, and prepared to accept direct shipments at the reasonable and proper delivery pens of each of said defendants at Union Stock Yards, Chicago, Ill., and within [fol. 41] a reasonable time to remove said direct shipments to its own plant without other use of the facilities of The

Union Stock Yard and Transit Company of Chicago than an egress to the nearest public street; that on and after May 25, 1933, said complainant would refuse to pay to the defendants or to their agent, The Union Stock Yard and Transist Company of Chicago, any yardage charge upon direct shipments so delivered by the defendants and so accepted and removed by Swift and Company; that Swift and Company at the same time sent a copy of said letter of May 9, 1933 to the agent of the defendants, The Union Stock Yard and Transit Company of Chicago; that on or about May 10, 1933 the President of The Union Stock Yard and Transit Company of Chicago addressed a letter to the Traffic Manager of complainant Swift and Company, in which said President stated that said complainants would not be permitted to take possession of direct shipments at the unloading pens of The Union Stock Yard and Transit Company of Chicago without payment of the yardage charges of said company for the use of its facilities; and that, unless and until said threat of not paying said yardage charges of The Union Stock Yard and Transit Company of Chicago was withdrawn, or until and unless such charges were paid, that company would not permit live stock consigned to complainants at said Union Stock Yards to be delivered to complainants or their employees on and after May 25, 1933; that thereafter, on or about May 16, 1933, complainant Swift and Company, on behalf of itself and its said subsid- [fol. 42] iaries, addressed a letter to the chief traffic officer of each of the defendants herein, in which attention was called to said letter of May 10, 1933, signed by the President of The Union Stock Yard and Transit Company of Chicago, advising said defendants that on and after May 25, 1933, The Union Stock Yard and Transit Company of Chicago had no authority to accept or receive live stock for complainants as their agent, for their account, or in their name; that after May 25, 1933, any delivery by any of defendants of complainants' direct shipments of live stock to The Union Stock Yard and Transit Company of Chicago, except as defendants' agent for unloading and delivery, would constitute a conversion of complainants' property; and that any payment by complainants of yardage charges to The Union Stock Yard and Transit Company of Chicago, made to gain possession of said direct shipments after said date, would be under protest, would be for the account of said defendants, and would be made purely in mitigation of

damages; that on or about May 24, 1933, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed a letter to the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, calling attention to the fact that said agent had refused to relinquish possession of complainants' direct shipments without payment of said yardage charges; that on or about May 24, 1933, the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, advised [fol. 43] complainants by letter that said Transit Company was willing to accept, from time to time, payment by complainants of said yardage charges after May 25, 1933, with the understanding that such payments would be made by complainants under protest and in mitigation of damages; and that it might also be understood, with respect to each and every of said direct shipments thereafter made to complainants, that a physical demand for delivery and for the right to promptly remove such stock from the premises of said Transit Company, without payment of such yardage charges, was to be considered as having been made by complainants as soon as said direct shipments were unloaded, and that said demand was refused by The Union Stock Yard and Transit Company of Chicago immediately after unloading; and that such demand would actually have been made but for the advice of The Union Stock Yard and Transit Company of Chicago that the same would be continually refused; that on May 19, 1933, each of the defendants addressed a letter to complainants refusing the demands made upon said defendants in complainant's said letter of May 9, 1933.

That on or about September 9, 1935, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed another letter to each of the principal traffic officers of the defendants herein, again demanding that complainants be permitted to obtain possession of their direct shipments of live stock consigned to the Union Stock Yards, Chicago, Ill., without payment of the yardage charges of [fol. 44] The Union Stock Yard and Transit Company of Chicago, and that complainants be permitted immediately to remove such live stock from the unloading pens to a public street by a proper and convenient means of egress to such street, to be designated by defendants, without other use of the property of The Union Stock Yard and Transit Company of Chicago; that on or about September 20, 1935,

each of said defendants addressed a letter to complainant Swift and Company, refusing said demand of complainants.

IX

That since May 25, 1933, in each instance where complainants have been compelled to pay yardage charges on direct shipments to defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to obtain possession thereof, such payment by each complainant has been made by its check or voucher in favor of The Union Stock Yard and Transit Company of Chicago, upon which there has been stamped by said complainant a notice that said payment is made under protest and in accordance with the terms of the letters above described. That, in addition thereto, after payment under protest of said yardage charges to The Union Stock Yard and Transit Company of Chicago, complainants have, at stated intervals, rendered to each of the defendants, respectively, bills against each of said defendants covering the amount of said yardage charges paid under protest to The Union Stock Yard and Transit Company of Chicago upon so many of the shipments as had [fol. 45] arrived during such period via the line of the defendant against whom such bill was made; that all of said demands of complainants for delivery of their direct shipments without assessment of said yardage charges and the payment of each of said bills against said defendants have been refused by the defendants.

X

That the demands herein recited made upon defendants by complainants have not sought the use by complainants of any of the pens, alleys, runways, overhead drives, or tunnels of defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to drive live stock to the packing plant of the complainants; but have sought only the lawful right of complainants to be permitted to take possession of their direct shipments of live stock at the unloading pens of the defendants herein at the Union Stock Yards, Chicago, Ill., and thence to remove said direct shipments of live stock to a public street by the shortest and most convenient means of egress, such route of egress to be determined by defendants.

XI

That the course of conduct of the defendants above described, in so delivering direct shipments of live stock to complainants at Union Stock Yards, Chicago, Ill., as to require complainants to pay yardage charges to defendants' agent, The Union Stock Yard and Transit Company of [fol. 46] Chicago, in order to obtain possession of complainants' live stock; the repeated refusal of said defendants to deliver direct shipments to complainants at defendants' live stock terminals at the Union Stock Yards in Chicago, upon payment to defendants of all lawful transportation charges published by the line-haul defendants; and the refusal by defendants of complainants' reasonable and lawful demands for egress from defendants' unloading pens to the nearest public street without payment of yardage charges to The Union Stock Yard and Transit Company of Chicago, constitute an unreasonable rule, regulation, or practice in connection with the transportation and delivery of complainants' said direct shipments, in that complainants are entitled to reasonably convenient and safe chutes, pens, and ways for discharging live stock from the line-haul defendants' cars and taking live stock from defendants' premises without the imposition of a yardage charge, and because transportation of such direct shipments under defendants' line-haul rates has not ended until complainants have been afforded an opportunity to remove their direct shipments of live stock from the unloading pens of the defendants at Union Stock Yards, Chicago.

XII

That by reason of the facts stated in the foregoing paragraphs, complainants have been subjected to the payment of rates and charges for the transportation of their direct shipments of live stock, consigned to them at Union Stock Yards, Chicago, Ill., via the lines of the defendants herein, [fol. 47] and to the application of rules, regulations, and practices which were and still are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act; that complainants have been injured thereby to their damage in the sum of $17,500.00 in connection with said direct shipments during a period of two years immediately prior to the filing of this complaint, and will continue to suffer such damage during the pendency of this proceeding.

Wherefore complainants pray that the defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act, and to establish and put in force and apply in future to the transportation of direct shipments of live stock from points of origin, as aforesaid, consigned to complainants, or any of them, at Union Stock Yards, Chicago, Ill., rules, regulations, or practices under which complainants may obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways, and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges of the defendants for the transportation of such direct shipments from the origin thereof to the [fol. 48] Union Stock Yards in Chicago, as provided in the tariffs of the defendants filed with the Commission; or such other reasonable rules, regulations, or practices of similar purport as the Commission may deem proper; and also to pay to complainants by way of reparation for the unlawful charges hereinbefore alleged the total sum of $17,500.00, plus such further amounts as may accrue due to similar violations of complainants' rights by defendants during the pendency of this proceeding, with interest from the date on which each of said yardage charges was paid under protest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Ill., this 18th day of September, 1937.

Swift and Company, Union Stock Yards, Chicago, Illinois, Omaha Packing Company, 2320 South Halsted Street, Chicago, Illinois, G. H. Hammond Company, Union Stock Yards, Chicago, Illinois, by Ross Dean Rynder, *Their Attorney.*

[fol. 49] Verification

STATE OF ILLINOIS,
County of Cook, ss:

J. H. Bliss, being duly sworn, deposes and says that he is Assistant Treasurer of Swift and Company, one of the complainants in the above entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

J. H. Bliss.

Subscribed in my presence, and sworn to before me, by the affiant above named, this 18th day of September, 1937. Robyn Wilcox, *Notary Public.* Commission expires February 1, 1939.

[fol. 50] EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 27862

SWIFT & COMPANY ET AL. v. ALTON RAILROAD COMPANY ET AL.

Submitted June 21, 1939. Decided April 8, 1940

1. Transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards, Chicago, Ill., found to be completed when the livestock is placed in the unloading pens at the Union Stock Yards. Yardage charges assessed by the Union Stock Yards & Transit Company of Chicago on direct shipments of livestock transported to the Union Stock Yards for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, found not subject to the jurisdiction of the Commission.

2. Defendants' failure to afford egress for direct shipments of livestock transported to the Union Stock Yards found not to have resulted or to result in an unreasonable practice.

3. Complaint dismissed.

R. D. Rynder for complainants.
Paul E. Blanchard for intervener.
H. R. Park for interested party.
Douglas F. Smith, Kenneth F. Burgess, and *Robert Thomas* for defendants.

Report of the Commission

Splawn, *Commissioner:*

Exceptions were filed to the examiner's report by complainant; defendants replied; and the parties were heard in argument.

Complainants are Swift and Company, and G. H. Hammond Company and Omaha Packing Company, wholly owned subsidiaries of Swift & Company. They, with the exception of G. H. Hammond Company, are engaged in the packing-house business and operate packing plants for the processing of livestock at Chicago, Ill. G. H. Hammond Company formerly operated a packing plant, but since the complaint was filed operation of the plant has ceased. Complainant's plants are located adjacent to the Union Stock Yards in Chicago, owned and operated by The Union Stock Yard and Transit Company of Chicago, hereinafter referred to as the Yard Company. The defendants are common carriers by railroad engaged in the transportation of livestock to Chicago. The Yard Company is not named a [fol. 51] defendant. Although live stock consigned to G. H. Hammond Company, and Omaha Packing Company at the Union Stock Yards has arrived at those yards in the past, the volume of shipments so consigned has been small. The bulk of the traffic about which complaint is made has been consigned to Swift & Company. For convenience, Swift & Company will be referred to as if it were the only complainant.

It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to re-

quire defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding.

Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939.

The situation complained of may be described as follows: A carload of livestock is shipped from a point in Iowa, consigned to Swift & Company at the Union Stock Yards in Chicago. This is known as a direct shipment, as distinguished from a shipment consigned to a commission merchant at the stockyards for sale. Under the provisions of section 15 (5) of the Interstate Commerce Act, the transportation includes delivery of the livestock into suitable pens at the stockyards at the line-haul rate without extra charge to the shipper or consignee. The livestock is transported by defendants to unloading platforms on the property of the Yard Company. Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of Swift & Company are at the unloading pens [fol. 52] when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens are suffi-

cient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture.

Complainant's claim is that delivery of the livestock into suitable pens at the stockyards includes delivery to it in such manner as to permit the animals to be removed by its employees from the unloading pens to the nearest public street without the payment of a yardage charge. It seeks to be relieved of the payment of the yardage charge on shipments of livestock consigned to it at the Union Stock Yards.

A complaint containing issues substantially similar was considered by the Supreme Court in *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which our order in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F Ry. Co.*, 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings.

The Union Stock Yards, owned and operated by the Yard Company, is located in Chicago and is the terminal at which the preponderant amount of the livestock transported by rail to Chicago is received. It is the largest livestock market in the United States and is the only public market for the sale of livestock in Chicago. Immediately west of the Union Stock Yards is an area commonly known as Packingtown. The plants of Swift & Company and other packers are located in this area. It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property. The Yard Company, with respect to part of its business, is a common carrier of freight by hire, is engaged in interstate commerce, and is subject

[fol. 53] to the Interstate Commerce Act.[1] It is also a stockyard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture.

The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards.

With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold.

The tracks of the line-haul carriers do not reach the stockyards, which are served exclusively by tracks owned by the Yard Company and leased by it to The Chicago River and Indiana Railroad Company. By authority of trackage rights and the use of their own crews and power, all livestock consigned for delivery at the stockyards is placed by the trunk lines on the tracks adjacent to the unloading platforms. When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals, except employees of that company. This is necessary for

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[1] *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330; *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213.

[2] Sections 201 to 229 of the Packers and Stockyards Act, title 7, U. S. C. A.

the efficient and orderly handling of the large number of shipments arriving at the yards.

The bulk of the movement is received at the yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between 3 and 8 a. m. In some instances, immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the yards.

During the more than 70 years of its existence the Union Stock Yards has been the principal terminal at which livestock consigned to Chicago has been received. Since the [fol. 54] beginning of its operations, the Yard Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises, irrespective of whether the shipments were direct shipments to a packer or whether they were consigned to a commission merchant for sale. Prior to 1927 the number of direct shipments received at the Union Stock Yards by complainant was relatively small. About that time, various conditions combined to make it necessary for the packers, including complainant, to purchase livestock in greater quantities at country points, and to have such shipments consigned to them at Chicago. By 1929 the number of direct shipments to complainant at the stockyards grew to a substantial amount. This condition continued for several years until complainant began to consign its direct shipments to the plant of its subsidiary, Omaha Packing Company, located approximately 2 miles from the Union Stock Yards. Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motortruck over the streets in Chicago to complainant's plant.

In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards,

and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of com- [fol. 55] plainant's property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest.

As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later, in September 1935, the demands were repeated in letters sent to the defendants and were again refused.

Since May 25, 1933, in each instance in which complainant has paid yardage charges on direct shipments it has done so under protest. At stated intervals since the above date, it has rendered bills against each defendant for the amount of yardage charges paid to the Yard Company under protest.

There is no dispute with respect to the character of service in the stockyards required on direct shipments. All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The live-

stock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933; when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge. Several suggestions as to means of egress were made. It was emphasized, however, that complainant is not demanding egress at any particular points but simply egress to a public street or highway via the shortest or most convenient way, to be designated by defendants. Because of the physical situation at the Union Stock Yards, defendants could not provide an egress from [fol. 56] the unloading pens to a public street, except by use of the property of the Yard Company.

As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immediate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other,

and Gustavus F. Swift, and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at [fol. 57] the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure

from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards," near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indiana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; "to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;" to guarantee that the Yard Company "shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its business at Chicago they [fol. 58] would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company.

It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants from Chicago and that some arrangement must be made to hold them. It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

The important fact is that, after the agreement of 1892 expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

[fol. 59] I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince)

told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.

The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture.

For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago.

[fol. 60] Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 percent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 percent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 percent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards.

The determination of the question at issue in this proceeding requires the determination of the point at which the

transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge.

Issues substantially similar to those here presented have been considered and decided in *Hygrade Food Products* [fol. 61] *Corp.* v. *Atchison, T. & S. F. Ry. Co. supra*, and *Atchison, T. & S. F. Ry. Co.* v. *United States, supra*. In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding, and, in its opinion, stated:

> Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

The Court also found that section 15 (5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock received," and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

Complainant here contends that the issue in this proceeding differs from that decided in the *Hygrade case;* that the complainant in the *Hygrade case* was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove animals from the unloading pens to the public streets. In the *Hygrade case* it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens.

[fol. 62] Reference is made by complainant to certain language[3] of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that "Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5)." In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens

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[3] "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yard Company's properties for this service from mere egress such as is included in the transportation of live stock to destinations other than public stockyards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

to plants outside the stockyards and a way out to the public highways. In either case, property of the yard company must be used.

Emphasis is placed by complainant on the provisions of the act which define "transportation" and to the inclusion in that term of the word "delivery," and it is contended that our jurisdiction is co-extensive with transportation as defined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request [fol. 63] of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words "delivery at public stockyards of inbound shipments into suitable pens" would have read "into suitable pens and from those pens to the boundary of the stockyards." The amendment indicates an intention by Congress to con-

stitute the pens as the point where the duties of the defenddants terminate. The word "suitable" is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards.

Complainant takes the position that there is nothing in the language of section 15 (5) that narrows or restricts our jurisdiction; that the provision is remedial and is entitled to a liberal interpretation that fairly accomplishes its purpose; that under such an interpretation it would seem that a pen from which it is impossible for a consignee, who is on hand when his stock is unloaded, to take his shipments without extra charge cannot be a suitable pen; that there is nothing in the provision to indicate that Congress meant to take away the opportunity to obtain complete possession of the property at destination; and that the contention that our jurisdiction ends at the unloading pens comprehends the proposition that defendants' common-law duty has been reduced by section 15 (5).

The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[4] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its un- [fol. 64] loading charge from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not com-

[4] *United States* v. *Union Stock Yard & Transit Co., supra.*

plain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted.

The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

> I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.* [Emphasis supplied.]

Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. [Emphasis supplied.]

Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. No complaint has ever been made by the pro-

ducers who sponsored the amendment regarding the payment of the yardage charge.

Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers since its enactment. When the amendment was proposed, the yardage charges had long been a matter of concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard Com- [fol. 65] pany to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15 (5) could reasonably be given the meaning they now urge.

The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 percent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to.

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail

movement to the Union Stock Yards of 94,629 cars. The shift from producers' consignments to direct shipments is rapidly increasing. The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.

Reference is made both by complainant and defendants to proceedings before us in which the question of yardage charges has been considered. An examination of the cases cited shows that in only two of them has the question here presented been determined.

The first case, after the enactment of section 15, (5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our juris- [fol. 66] diction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

The other case in which an issue similar to the issue herein was considered was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co., supra.* There complainant's employees had taken possession of approximately 15 per cent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

Since the decision of the Supreme Court in the *Hygrade case,* the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470; *Livestock to or from Union Stock Yards, Chicago,* 222 I. C. C. 765.

In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v.

United States, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra; Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary.

Defendants contend that we cannot enter an effective order in this complaint granting the relief sought, because the Yard Company is an indispensable party and is not named a defendant. It points out that the Yard Company is a common carrier subject to the act and is solely responsible for the practice complained of; that it levies, collects, and retains for itself the yardage charge; that it denies use of its property unless the yardage charges are paid to it; and that it alone can modify or permit the modification of the charges and practices complained of. In view of our findings herein, it is unnecessary to determine this question.

The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable [fol. 67] pens. That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock

at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

In the *Hygrade case* the Supreme Court stated that, with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the *Hygrade case* it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the line-haul carriers ceased when the animals were placed in the unloading pens.

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this respect, trans- [fol. 68] ported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

The complaint will be dismissed.

ALLDREDGE, *Commissioner*, dissenting:

In my judgment the report in this case misconstrues the opinion of the Supreme Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. Reliance is placed upon one statement contained therein to the effect that transpor-

tation of livestock destined to public stockyards ends upon the unloading of the stock into suitable pens. A correct construction of the opinion of the Court is, I believe, that the Court did not consider that the question of free egress from the stockyards was presented for decision, that the Court did not itself undertake to say that the transportation ended with delivery into unloading pens, and that it set aside the findings in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, not because they were wrong in principle, but because they were technically inadequate.

Neither am I able to find anything in the Court's opinion revealing a purpose to set aside the principles enunciated in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, relied upon by us in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co., supra*, and likewise specifically applicable to the facts and circumstances disclosed in the instant proceeding. It was there said (pages 135-136):

A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

[fol. 69] Consistent with the principles set forth in the foregoing excerpt from the opinion of the Court I think we should here find that defendants' transportation obligations do not end with delivery of the stock into unloading pens,

and that it is their duty under the law to afford through their agent, the stockyard company, access to the property of the latter for removal of their livestock therefrom, within a reasonable time after it has been placed in unloading pens, and without the payment of any special toll or charge, and that the transportation does not end until the obligations above set forth have been fulfilled.

Chairman Eastman and Commissioner Aitchison did not participate in the disposition of this case.

[fols. 70-71] EXHIBIT "C" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 8th day of July, A. D. 1940.

No. 27862

SWIFT & COMPANY, et al.,

v.

ALTON RAILROAD COMPANY, et al.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of complainants for reargument, reconsideration and reversal of the order:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 72] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed December 16, 1940

First Defense

This Court is without jurisdiction to entertain the complaint.

(1) The order complained of is not reviewable under the Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. 41(28).

(2) Plaintiff, pursuant to the provisions of section 9 of the Interstate Commerce Act, 49 U. S. C. 9, elected to adopt the procedure before the Interstate Commerce Commission for reparation upon the claim stated in its complaint. Notwithstanding such election and the provision of section 9 that the elected remedy is exclusive, plaintiff now attempts to pursue the alternative remedy provided by section 9.

Second Defense

The defendant, the United States of America:

1. Admits the allegations of paragraphs 1 to 6, inclusive.

[fols. 73-74] 2. Denies the allegations of paragraphs 7 to 29, inclusive.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Thurman Arnold, Assistant Attorney General.

Frank Coleman, Special Assistant to the Attorney General.

J. Albert Woll, Esq., United States Attorney.

I certify that a true copy of the foregoing Answer of the United States of America was this day mailed to the following persons:

Edgar B. Kixmiller, Esq., Ross Dean Rynder, Esq., 41 Packers Avenue, Chicago, Illinois, Counsel for Plaintiff.

Daniel W. Knowlton, Esq., Washington, D. C., Counsel for Interstate Commerce Commission.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

December 12, 1940.

[fols. 75-76] In the District Court of the United States

[Title omitted]

Amendment to Answer of United States of America—Filed March 29, 1941

Comes now the United States of America, defendant herein, and by written consent of the plaintiffs, amends its answer by striking out the paragraph captioned "First

Defense" and by substituting in its place the following paragraph:

First Defense

This Court is without jurisdiction under the Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. 41(28), to entertain the complaint in so far as it seeks a determination by this Court (a) as to whether plaintiff is entitled to reparation, or (b) as to the amount thereof, or the basis upon which an award thereof should be made.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

No objection to amendment.

Edgar B. Kixmiller, Ross Dean Rynder, Counsel for Plaintiffs.

March 28, 1941.

[fol. 77] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Dec. 6, 1940

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

The Commission admits that the allegations contained in paragraphs 1 to 6, inclusive, of the bill of complaint are correct.

[fol. 78] II

Answering paragraphs 7 to 28, inclusive, of the bill of complaint, the Commission admits and alleges that it made the report and order of April 8, 1940, referred to in para-

graph 5 of the bill of complaint, in a proceeding known upon the records of the Commission as No. 27862, *Swift and Co., et al.* v. *Alton R. Co., et al.*, 238 I. C. C. 179, a true and correct copy whereof is attached to the Bill of Complaint, marked Exhibit "B"; admits and alleges that subsequently it made and entered the order of July 8, 1940, referred to in said paragraph 5 in which it dismissed plaintiffs' petition for reargument, reconsideration, and reversal of the order theretofore made; and admits and alleges that a true and correct copy of the latter order is attached to the Bill of Complaint, marked Exhibit "C".

The Commission further alleges that in said proceeding the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said order was submitted to the Commission for consideration, by the counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and duly [fol. 79] served upon the parties to said proceeding, its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions, orders and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said reports and order of April 8, 1940, are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that said report and order of April 8, 1940, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

The Commission specifically denies that plaintiffs will suffer damage by reason of its report and order as alleged [fols. 80-82] in paragraph 29 of the Bill of Complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of April 8, 1940.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, By Daniel W. Knowlton, Chief Counsel.

Duly sworn to by Walter M. W. Splawn jurat omitted in printing.

[fols. 83-84] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted].

AMENDMENTS TO ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 2, 1941

Comes now the Interstate Commerce Commission, defendant herein, and by written consent of the adverse parties to this cause amends its answer in the following particulars:

1. By adding at the beginning thereof a paragraph captioned "First Defense", reading as follows:

First Defense

This Court is without jurisdiction under the Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. 41(28), to en-

tertain the complaint in so far as it seeks a determination by this Court (a) as to whether plaintiff is entitled to reparation, or (b) as to the amount thereof, or the basis upon which an award thereof should be made.

2. By adding immediately thereafter the words "Second Defense" as a caption or heading, for the answer as it now stands filed, which will otherwise remain unchanged.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington, D. C.

No objection to amendment.

Edgar B. Kixmiller, Ross Dean Rynder, Counsel for Plaintiffs.

March 31, 1941.

[fol. 85] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 2188

SWIFT AND COMPANY and OMAHA PACKING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Charles M. Thomson, Trustee of Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago River and Indiana Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Ceneral Railroad Company, Lessee), Illinois Central Railroad Company, The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee), G. W. Webster and Joseph Chapman, Trustees

of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, Applicants for Intervention

MOTION TO INTERVENE AS PARTIES DEFENDANT—Filed December 23, 1940

Now come The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Charles M. Thomson, Trustee of Chi-
[fol. 86] cago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company; and move the Court for leave to intervene in this action in order to assert the defenses set forth in their answer which accompanies this motion and is made a part hereof and of which a copy is hereto attached, and in support of said motion show the Court as follows:

1: That the complaint in the above entitled cause involves the validity of a certain order of the Interstate Commerce Commission entered by the said Commission on or about April 8, 1940, in the case entitled: "Swift and Company, et al. v. The Alton Railroad Company, et al.," Interstate

Commerce Commission Docket No. 27862, in that the said complaint seeks to enjoin, set aside, annul and suspend the said order entered pursuant to the report of said Commis- [fols. 87-87a] sion issued at the same time, which order and report are annexed to and made a part of the complaint as Exhibit "B" thereof, and which order and report are hereby made a part of this motion by reference.

2. That all the said applicants for intervention were parties in interest to the said proceeding before the Interstate Commerce Commission, as shown in Exhibit "A", which exhibit is attached to and made a part of the complaint.

3. That under Sections 212 and 213 of the Judicial Code, as amended by the Act of October 22, 1913 (Chapter 32, 38 Stat. 220, 28 U. S. C. Sec. 45a), said applicants for intervention, as such parties in interest to the said proceeding before the Interstate Commerce Commission, have an unconditional right to intervene in and appear as parties to this cause which involves the validity of the said order of the Interstate Commerce Commission entered in the said proceeding and the interest of each of the said applicants.

Wherefore, said applicants respectfully pray for the entry of an order granting them leave to intervene herein and to be made parties defendant hereto and to file instanter their separate answer to the complaint heretofore filed herein.

(Signed) Kenneth F. Burgess, Douglas F. Smith, D. Robert Thomas, Jr., Attorneys for said Applicants for Intervention. Address: 11 South LaSalle Street, Chicago, Illinois.

Sidley, McPherson, Austin & Burgess, of Counsel.

[fol. 88] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING LEAVE TO THE ALTON RAILROAD COMPANY, ET AL. TO INTERVENE AS PARTIES DEFENDANT. ENTERED DEC. 23, 1940.

This cause coming on to be heard on the motion of The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad

Company; The Chesapeake and Ohio Railway Company; Charles M. Thomson, Trustee of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York [fols. 89-90] Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company for leave to intervene in and to be made parties to the above entitled cause and to file their separate answer to the complaint heretofore filed in said cause, the Court, upon consideration thereof, and being fully advised in the premises, finds that said motion should be granted.

It Is Therefore Ordered, Adjudged and Decreed that the said applicants for intervention be and they are hereby given leave to intervene in and they are hereby made parties to the above entitled cause.

It Is Further Ordered that said applicants for intervention may file instanter their separate answer to the bill of complaint heretofore filed herein in the same manner and with like effect as if named in the original bill as parties hereto.

Enter:

William M. Sparks, United States Circuit Court Judge; Philip L. Sullivan, United States District Court Judge; M. L. Igoe, United States District Court Judge.

Dated: April 15, 1940.

[fol. 91] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

INTERVENERS' ANSWER—Filed December 23, 1940

Now come The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Charles M. Thomson, Trustee of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York Central Railroad [fol. 92] Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, intervening defendants, hereinafter referred to as the interveners, and for their separate answer to plaintiffs' complaint herein, allege and say:

I

Interveners are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 2 of the complaint.

II

Interveners admit the allegations contained in Paragraph 3 of the complaint.

III

Answering Paragraph 4 of the complaint, interveners admit that the complaint is brought against the United States, and the Interstate Commerce Commission, and the

jurisdiction of this court, if any, is conferred pursuant to the statutes cited in said Paragraph 4.

IV

Interveners admit the allegations contained in Paragraphs 5 and 6, inclusive, of the complaint.

V

Answering Paragraph 7 of the complaint interveners deny that the said report and order of the Interstate Commerce Commission are erroneous or void or of no effect or in violation of the provisions of the Interstate Commerce Act [fol. 93] or of any other law of the United States for the reasons therein alleged or for any other reasons.

Interveners further state on information and belief that the plaintiffs pay to The Union Stock Yard and Transit Company of Chicago certain yardage charges assessed and collected by the said The Union Stock Yard and Transit Company pursuant to a tariff schedule published and filed with the Secretary of Agriculture. Interveners further assert that the said yardage charges are not assessed or collected by these interveners and that said charges are not for transportation services but cover services rendered and facilities furnished after transportation of the plaintiffs' direct shipments has been completed.

Interveners deny each and every allegation contained in Paragraph 7 of the complaint.

VI

Answering Paragraph 8 of the complaint, interveners deny that the said decision of the Interstate Commerce Commission is erroneous; interveners further deny that plaintiffs have suffered damages in the sum of $17,500 or in any other sum as the result of any act or failure to act or of any practice of the interveners.

Interveners are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 8 of the complaint. Interveners further state that, if such remaining allegations are true, they involve services performed and facilities furnished by the Union Stock Yard and Transit Company after the transportation of the said direct shipments and inter- [fol. 94] veners' obligations therefor have wholly ceased and terminated.

VII

Answering Paragraph 9 of the complaint interveners deny the matters and things and conclusions alleged therein.

Interveners allege that, in the proceeding wherein the report and orders here attacked were entered, a full hearing, as provided in and by the Interstate Commerce Act, was granted to all parties to the said proceeding, including the plaintiffs herein; that evidence, both oral and documentary, bearing on the matters covered in and by the report and orders of the Commission was submitted to the Commission; that in briefs filed in said proceeding all questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of all parties, including the plaintiffs herein; that by its report and orders the Commission, after a full hearing, has determined the matter presented to it in said proceeding; that the Commission, after a full hearing, has determined the issues against the plaintiffs; that the findings and conclusions of the Commission as set forth in its report and orders filed with the complaint herein, and each of them, were and are fully supported and justified by the evidence submitted in this proceeding; that in making said order the Commission did not exceed the authority conferred upon it and that none of its findings or conclusions or orders was made either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it; that said orders were made in the exercise of the authority vested in the Commission by the Interstate Commerce Act after [fol. 95] a full and lawful hearing and in the light of all the evidence presented; and that the said orders are not confiscatory of the property of plaintiffs, are not without due process of law, and do not deprive plaintiffs of their property without due process of law in the respects alleged in the complaint or in any other respects.

VIII

Interveners deny the matters and things and conclusions contained in Paragraphs 10 through 29, inclusive, of the complaint.

IX

Except as herein expressly admitted, interveners deny the truth of each and all of the allegations contained in the

complaint in so far as they conflict with the allegations herein or with the findings, statements or conclusions included in said report and order of April 8, 1940 and the order of July 8, 1940 which report and orders are hereby referred to and made a part hereof.

X

For a further defense, interveners allege that The Union Stock Yard and Transit Company of Chicago was a necessary and indispensable party to the said proceeding before the Interstate Commerce Commission and the relief sought in the complaint before the Commission could not have been granted because the said Union Stock Yard and Transit Company was not named a defendant in those proceedings. Interveners allege, on information and belief, that said The Union Stock Yard and Transit Company assesses, collects [fols. 96-97] and retains the yardage charges here complained of, publishes and files the said yardage charges with the Secretary of Agriculture, performs the services and owns, operates and furnishes the facilities covered by the yardage charges, and denies the use of its property unless the yardage charges are paid to it, and that it alone can modify or be required to modify the yardage charges and practices here complained of.

Wherefore, having fully answered the complaint, interveners pray that the relief therein prayed be denied and the complaint be dismissed with costs to the interveners and that interveners have the benefit of such other and further orders, decrees or relief as may be just and proper.

Kenneth F. Burgess, D. Robert Thomas, Jr., Douglas F. Smith, Attorneys for said Interveners, Address: 11 So. LaSalle Street, Chicago, Illinois.

Sibley, McPherson, Austin & Burgess, Of Counsel.

[fol. 98] In the District Court of the United States

[Title omitted]

Order Granting Motion of Interveners for Leave to Amend Answer—April 15, 1941

This cause coming on to be heard on the motion of The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company;

Charles M. Thomson, Trustee of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York Central Railroad Company; The [fols. 99-100] New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company; for leave to amend their original answer by striking therefrom Paragraph III and substituting therefor a new Paragraph III, as set forth in said motion, and the Court being fully advised in the premises, finds that said motion should be granted.

It Is Therefore Ordered, Adjudged and Decreed that said interveners be and they are hereby granted leave to amend their answer in the manner indicated in said motion, and that they may file instanter their answer, so amended, to plaintiffs' bill of complaint.

Enter:

William M. Sparks, United States Circuit Court Judge; Philip L. Sullivan, United States District Court Judge; M. L. Igoe, United States District Court Judge.

Dated: April 15, 1941.

[fol. 101] In the District Court of the United States

[Title omitted]

Interveners Amended Answer—Filed April 15, 1941

Now come The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore

and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Charles M. Thomson, Trustee of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York Central Railroad [fol. 102] Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, intervening defendants in the above entitled cause, leave of Court having been first had and obtained, and file this, their first amended answer in this cause, and say:

I

Interveners are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 of the complaint.

II

Interveners admit the allegations contained in paragraph 3 of the complaint.

III

Answering paragraph 4 of the complaint, interveners admit that the complaint is brought against the United States and the Interstate Commerce Commission, but deny the jurisdiction of this Court is conferred pursuant to U. S. C. A., Tit. 28, Sections 41(27), 41(28), 43, 44, 45, 45a, 46, 47 and 48. Interveners allege that the order complained of is not reviewable under the statutes cited in said paragraph 4, and that this Court is without jurisdiction to entertain the complaint.

IV

Interveners admit the allegations contained in Paragraphs 5 and 6, inclusive, of the complaint.

[fol. 103]

V

Answering Paragraph 7 of the complaint interveners deny that the said report and order of the Interstate Commerce Commission are erroneous or void or of no effect or in violation of the provisions of the Interstate Commerce Act or of any other law of the United States for the reasons therein alleged or for any other reasons.

Interveners further state on information and belief that the plaintiffs pay to The Union Stock Yard and Transit Company of Chicago certain yardage charges assessed and collected by the said The Union Stock Yard and Transit Company pursuant to a tariff schedule published and filed with the Secretary of Agriculture. Interveners further assert that the said yardage charges are not assessed or collected by these interveners and that said charges are not for transportation services but cover services rendered and facilities furnished after transportation of the plaintiffs' direct shipments has been completed.

Interveners deny each and every other allegation contained in Paragraph 7 of the complaint.

VI

Answering Paragraph 8 of the complaint, interveners deny that the said decision of the Interstate Commerce Commission is erroneous; interveners further deny that plaintiffs have suffered damages in the sum of $17,500 or in any other sum as the result of any act or failure to act or of any practice of the interveners.

Interveners are without knowledge or information sufficient to form a belief as to the truth of the remaining [fol. 104] allegations contained in Paragraph 8 of the complaint. Interveners further state that, if such remaining allegations are true, they involve services performed and facilities furnished by the Union Stock Yard and Transit Company after the transportation of the said direct shipments and interveners' obligations therefor have wholly ceased and terminated.

VII

Answering Paragraph 9 of the complaint interveners deny the matters and things and conclusions alleged therein.

Interveners allege that, in the proceeding wherein the report and orders here attacked were entered, a full hearing, as provided in and by the Interstate Commerce Act, was granted to all parties to the said proceeding, including the plaintiffs herein; that evidence, both oral and documentary, bearing on the matters covered in and by the report and orders of the Commission was submitted to the Commission; that in briefs filed in said proceeding all questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of all parties, including the plaintiffs herein; that by its report and orders the Commission, after a full hearing, has determined the matter presented to it in said proceeding; that the Commission, after a full hearing, has determined the issues against the plaintiffs; that the findings and conclusions of the Commission as set forth in its report and orders filed with the complaint herein, and each of them, were and are fully supported and justified by the evidence submitted in this proceeding; that in making said order the Commission did not exceed the authority conferred upon it and that none of its findings or conclusions or orders was [fol. 105] made either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it; that said orders were made in the exercise of the authority vested in the Commission by the Interstate Commerce Act after a full and lawful hearing and in the light of all the evidence presented; and that the said orders are not confiscatory of the property of plaintiffs, are not without due process of law, and do not deprive plaintiffs of their property without due process of law in the respects alleged in the complaint or in any other respects.

VIII

Interveners deny the matters and things and conclusions contained in Paragraphs 10 through 29, inclusive, of the complaint.

IX

Except as herein expressly admitted, interveners deny the truth of each and all of the allegations contained in the

complaint in so far as they conflict with the allegations herein or with the findings, statements or conclusions included in said report and order of April 8, 1940 and the order of July 8, 1940 which report and orders are hereby referred to and made a part hereof.

X

For a further defense, interveners allege that The Union Stock Yard and Transit Company of Chicago was a necessary and indispensable party to the said proceeding before the Interstate Commerce Commission and the relief sought in the complaint before the Commission could not have [fols. 106-107] been granted because the said Union Stock Yard and Transit Company was not named a defendant in those proceedings. Interveners allege, on information and belief, that said The Union Stock Yard and Transit Company assesses, collects and retains the yardage charges here complained of, publishes and files the said yardage charges with the Secretary of Agriculture, performs the services and owns, operates and furnishes the facilities covered by the yardage charges, and denies the use of its property unless the yardage charges are paid to it, and that it alone can modify or be required to modify the yardage charges and practices here complained of.

Wherefore, having fully answered the complaint, interveners pray that the relief therein prayed be denied and the complaint be dismissed with costs to the interveners and that interveners have the benefit of such other and further orders, decrees or relief as may be just and proper.

Kenneth F. Burgess, Douglas F. Smith, D. Robert Thomas, Jr., Attorneys for said Interveners. Address: 11 South LaSalle Street, Chicago, Illinois.

Sidley, McPherson, Austin & Burgess, of Counsel.

[fol. 108] In the District Court of the United States

[Title omitted]

Petition for Intervention of Armour and Company—Filed April 21, 1941

Now comes Armour and Company and respectfully petitions for order of this Honorable Court, permitting it to

intervene herein and become a party hereto to the extent hereinafter indicated; and for grounds for its proposed intervention respectfully shows:

That petitioner was a party to the case before the Commission which is here for review, and under Section 45a of Title 28, United States Code Annotated (Sections 212 and 213, Judicial Code), is entitled to intervene in this proceeding as a matter of right.

During the period covered by the complaint herein petitioner made shipments of livestock which, like the complainant therein, it billed to the premises of the Union Stock Yards and Transit Company, located at the tariff station, Union Stock Yards, Illinois. During the same period petitioner made other shipments of livestock which it billed to the same tariff station, but not to the public stock yards located at such station; no such shipments were considered by the Commission in the case at bar, and peti- [fols. 109-111] tioner asserts no rights herein as to such shipments, but reserves the right to proceed as to such shipments before the courts or the Commission for the recovery of damages suffered by it with regard thereto, same being without the scope of the proceedings now pending before this court or before the Commission below.

Dated at Chicago, Illinois April 21st, 1941.

Armour and Company, by Chas. J. Faulkner, Jr., John Potts Barnes, Paul E. Blanchard, Attorneys.

[fol. 112] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Plainiffs' Proposed Findings of Fact, Conclusions of Law, and Order—Filed May 9, 1941

INTRODUCTION

In accordance with leave granted by the court at the oral argument on April 21, 1941, plaintiff submits below proposed findings of fact, conclusions of law, and an order which the court is respectfully requested to adopt and make.

[fol. 113] PLAINTIFF'S PROPOSED FINDINGS OF FACT AND AUTHORITIES IN SUPPORT THEREOF

Findings of Fact	Authorities
1	
No stock yard services, subject to the *Packers and Stockyards Act, 1921* (U. S. C. A. tit. 7), are desired or requested by plaintiff.	The quoted paragraphs in left column are from the findings by Commission at p. 184 of decision (exhibit "B" to the complaint).
"All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant (plaintiff) installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's (plaintiff's) employees. Complainant (plaintiff) does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.	

"Complainant (plaintiff) demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge."

[fol. 114]

2	
The railroad team tracks mentioned in the decision of the Commission are not equipped with chutes, pens, or other facilities for unloading or delivery of live stock.	R. A. Sperry, witness for railroads, transcript of testimony before Commission, pp. 485-486. F. F. Hoffman, witness for railroads, transcript of testimony before Commission, p. 551. Commission's decision, p. 189, par. 1, (exhibit "B" to the complaint).
3	
Plaintiff's industry tracks are not equipped with chutes, pens, or other facilities for unloading and delivery of live stock.	Plaintiff's witness, M. J. Barron, transcript of testimony before the Commission, pp. 1009-1010, and exhibit 92.

4

The Chicago rates applicable to the railroad unloading pens at the Union Stock Yards do not apply to deliveries upon plaintiff's industrial side tracks at its plants at the Union Stock Yards. The rates for deliveries upon such industry tracks consist of the Chicago rates applicable to defendants' unloading pens at the Union Stock Yards, plus a switching charge of $19.50 per car from the unloading pens to the industrial side tracks.

Plaintiff's witness, M. J. Barron, transcript of testimony before the Commission, pp. 1006-1008.

[fol. 115]

5

The Union Stock Yard and Transit Company is a terminal of the line haul railroads, performs their railroad terminal services within the meaning of the Interstate Commerce Act (as their agent), and files with the Interstate Commerce Commission a tariff naming its charges for terminal services ("as railroad's agent").

The Union Stock Yards is named in the railroad tariffs as a specific station to which the railroad rates to Chicago are applicable.

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Cattle Raisers' Asso. v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277.

Live Stock Loading and Unloading Charges, 52 I. C. C. 209.

Live Stock Loading and Unloading Charges, 58 I. C. C. 164.

Hygrade Food Products Corp. v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330.

Chicago Live Stock Exc. v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531.
Livestock To or From Union Stock Yards, Chicago, 222 I. C. C. 765.
(For Interstate Commerce Commission decisions just cited, see pages 35-37 of plaintiff's brief.)
U. S. Y. & T. Co. tariff No. 9, I. C. C. No. 12 (t. 93).

6

The Union Stock Yards have become the common live stock depot of the railroad defendants. The stock yard company, in supplying its yards, performs there the transportation service which the carriers are under a duty to render.

See authorities under No. 5.

[fol. 116]

7

The Union Stock Yard and Transit Company functions in a dual capacity. It is a public stock yard subject to the *Packers and Stockyards Act, 1921*, and to regulation by the Secretary of Agriculture thereunder as to stock yard services. For such services it publishes its stock yard tariff and files it with the Secretary of Agriculture.

Packers and Stockyards Act, 1921, U. S. C. A. tit. 7.
U. S. Y. & T. Co. tariff No. 10, filed with the Secretary of Agriculture, exhibit 3 in evidence before Commission.

8

The Union Stock Yard and Transit Company also provides ("as agent") ter-

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

minal facilities for the railroads which become in substance the property of the railroads under lease. Acting in this capacity, the Union Stock Yard and Transit Company has been held to be a common carrier by railroad subject to the *Interstate Commerce Act* and files its tariff with the Interstate Commerce Commission.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.
U. S. Y. & T. Co. tariff, I. C. C. No. 12, filed with the Interstate Commerce Commission, transcript of evidence before the Commission, p. 93.

[fol. 117] PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW AND AUTHORITIES IN SUPPORT THEREOF

1

Conclusions of Law	Authorities
Interstate transportation of live stock to the railroad defendants' station at the Union Stock Yards does not end until after unloading for delivery or tender to the consignee at said destination.	*Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73. *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226. *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198. *United States* v. *Interstate Commerce Commission*, 73 F. (2d) 948. *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913.

2

The mere privilege of immediate removal from the unloading pens, "a mere way out to the public highways", is an essential part of the delivery.	*Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 201, 79 L. ed. 1382. *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913.

3

Section 15 (5) of the *Interstate Commerce Act* did not supersede or modify the provisions of section 1 (3) of said act with respect to the delivery of live stock at public stock yards.

United States v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226.
Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.
United States v. *Interstate Commerce Commission*, 73 F. (2d) 948.
Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.
Allied Packers v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Plaintiff's brief, p. 21.)
E. Kahn's Sons Co. v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. (Plaintiff's brief, p. 22.)

[fol. 118]

4

The legislative history of section 15 (5) of the *Interstate Commerce Act* does not support the conclusion of the Commission to the effect that section 15 (5) was intended to amend existing law so as to repeal or modify section 1 (3) of the *Interstate Commerce Act* or the law of the *Covington case* as to unloading and delivery of live stock by railroad common carriers at public stock yards.

Allied Packers v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Plaintiff's brief, p. 76.)
Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. ed. 1382.
Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.
Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.
Legislative history of section 15 (5) (pp. 98-117, supplement to plaintiff's brief).

5

If the present railroad rates to the railroad station at the Union Stock Yards do not afford compensation to the railroads for egress from the pens, the Commission may and should prescribe a reasonable additional charge for such egress.

This conclusion follows the language of the Supreme Court in *Armour & Co.* v. *Alton Railroad Co.*, 312 U. S. —, 85 L. ed. 483.

6

If use of the terminal facilities of the Union Stock Yards for egress to the street after unloading of live stock is a part of transportation and, if this use is a service for which reasonable compensation is justified, this charge, like the unloading charge, is a part of the reasonable transportation rate, determination of which is committed to the jurisdiction of the Interstate Commerce Commission.

This conclusion follows precisely the language of the Supreme Court in *Armour & Co.* v. *Alton Railroad Co.*, 312 U. S. —, 85 L. ed. 483.

[fol. 119]

7

The charges here assailed, in so far as they were assessed for the use of stock yard facilities in effecting delivery of interstate shipments of live stock, were charges for transportation within the meaning of that term as defined in section 1 of the *Interstate Commerce Act*, and the Interstate Commerce Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

This conclusion follows exactly the finding of the Interstate Commerce Commission in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Plaintiff's brief, p. 21.)

[fol. 120] 8

The fact that egress from the railroad defendants' unloading pens would necessarily be across property of their agent, Union Stock Yard and Transit Company, does not deprive the Commission of authority to make an order against said railroad defendants requiring egress for plaintiff's shipments, with or without a rate change covering such service.

Section 1 (3) of *Interstate Commerce Act* defining railroads and transportation (supplement to plaintiff's brief, p. 154).

Central Stock Yards Co. v. *Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565.

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Cattle Raisers' Asso. v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277.

Live Stock Loading and Unloading Charges, 52 I. C. C. 209, 219, 220.

Live Stock Loading and Unloading Charges, 58 I. C. C. 164, 168.

Hygrade Food Products Corp. v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, 554.

Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330, 336, 337.

Chicago Live Stock Exc. v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 545.

Livestock To or From Union Stock Yards, Chicago, 222 I. C. C. 765, 766.

(For Interstate Commerce Commission decisions just cited, see pages 33-37 of plaintiff's brief.)

[fol. 121] 9

The Commission erred in finding that the Secretary of Agriculture has asserted jurisdiction over and fixed charges for mere egress from railroad unloading pens at public stock yards to a public street for live stock upon which no "yardage service" (as defined in the act) is requested, desired, or received.

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 80 L. ed. 1033.

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470, 82 L. ed. 1469.

Union Stock Yards Co. of Omaha v. *United States*, 9 F. Supp. 864.

B. A. I. Dkt. No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company* (exhibit 43 in present case).

B. A. I. Dkt. No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Company* (exhibit 41 in present case).

B. A. I. Dkt. No. 344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.* (exhibit 42 in present case).

10

The issues in the present case are not the same as those which were before the Commission and the court in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, and *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

Decision of Supreme Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 200, 79 L. ed. 1382, 1389.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Statement by Commission of issues in present case, pp. 180-181 of Commission's decision (exhibit "B" to the complaint).

[fol. 122] 11

Section 406 (a) of the *Packers and Stockyards Act, 1921,* (U. S. C. A. tit. 7, § 226) reserves to the Interstate Commerce Commission power and jurisdiction over all matters relating to the transportation and delivery of live stock by railroad common carriers, including all services essentially a part of such transportation and delivery.

See section 406 (a) (U. S. C. A. tit. 7, § 226) (p. 160 of supplement to plaintiff's brief).

Atchison, T. & S. F. R. Co. v. *United States,* 295 U. S. 193, 200, 79 L. ed. 1382, 1389.

Armour & Co. v. *Alton Railroad Co.,* 312 U. S. —, 85 L. ed. 483.

12

This court will not decide whether the Union Stock Yard and Transit Company is a necessary and indispensable party in advance of a ruling upon that question by the Interstate Commerce Commission. If the Union Stock Yard and Transit Company is a necessary party, the complaint before the Commission may be amended after remand so as to make it an additional party.

This question was presented to but not decided by the Interstate Commerce Commission. See fourth paragraph, p. 195, decision of Commission, exhibit "B" to the complaint.

The failure to make the stock yard company a party defendant in the complaint before the Commission does not defeat plaintiff's right to the relief here sought.

See pp. 47-55 of plaintiff's brief.

The contract of July 1, 1891, created no tri-party relation between the stock yards, the railroads, and plaintiff. The contract related solely to stock yard services, as distinguished from railroad common carrier service. The railroads were not a party to said contract, gave no consideration in connection therewith, received no benefit thereunder. The question of egress from railroad unloading pens was not involved in said contract.

The contract of July 1, 1891 throws no light upon whether section 15 (5) amended the law of the *Covington case.*

Exhibits 47 and 48, transcript of evidence before Commission, p. 811.

14

Plaintiff is ~~not~~ estopped to prosecute this proceeding and to obtain the relief herein sought by reason of the contract (exhibit 47) between plaintiff (and others) and The Chicago Junction Railways and Union Stock Yards Company, executed as of July 1, 1891 and which expired July 1, 1906.

Interstate Com. Com. v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319.

Louisville & N. R. Co. v. *United States*, 282 U. S. 740, 75 L. ed. 672.

Merchants Warehouse Co. v. *United States*, 283 U. S. 501, 75 L. ed. 1227.

If the Union Stock Yard and Transit Company was ever the agent of plaintiff for the receipt from the railroads of plaintiff's shipments of live stock to Chicago, that agency was ended by plaintiff's notices to the railroad defendants of May 9, 1933, May 16, 1933, and September 9, 1935.

See copies of plaintiff's letters to the railroad defendants (supplement to plaintiff's brief, pp. 57-71).

16

The railroads do not provide the delivery of live stock to which plaintiff is entitled as a matter of law by placing cars of live stock upon railroad team tracks which are not equipped with any facilities for unloading, such as chutes, pens, or yards.

Covington Stock Yards Co. v. *Keith*, 139 U. S. 128, 35 L. ed. 73.

Central Stock Yards Co. v. *Louisville & N. R. Co.*, 118 F. 113.

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

A., T. & S. F. Ry. Co. v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92.

Switching Charges at South Omaha, Nebr., 36 I. C. C. 198.

Felin & Co. v. P. & R. Ry. Co., 37 I. C. C. 231.

Dimmitt-Claudle-Smith Live Stock Commission Co. v. *C., B. & Q. R. R. Co.*, 47 I. C. C. 287.

American National Live Stock Asso. v. *A., T. & S. F. Ry. Co.*, 122 I. C. C. 609.

E. Kahn's Sons Co. v. *Baltimore & O. R. Co.*, 192 I. C. C. 705.

(For Interstate Commerce Commission decisions just cited, see pages 41-43 of plaintiff's brief.)

[fol. 125] 17

The railroads do not provide the delivery of live stock to which plaintiff is entitled as a matter of law by placement upon industry tracks which are not equipped with unloading facilities, such as chutes, pens, or yards.

(See citations under No. 16.)

18

Plaintiff has an unqualified right to consign its live stock to the Union Stock Yards Station of the railroads, rather than to an industrial side track (not equipped with unloading facilities) which would involve an additional switching charge of $19.50 per car above the railroad line haul rate to the railroads' terminal unloading facilities at the Union Stock Yards.

Where two stations are so named, one requiring the payment of a freight rate of $19.50 per car higher than the other, the shipper is under no obligation to select the station to which the higher rate applies merely to avoid the consequences of the carrier's failure to meet its delivering obligations at the lower rated station.

Record, p. 92, shows that railroads publish rates to their terminal at the Union Stock Yards, Chicago, and, pp. 1006-1008, that the additional cost for delivery on an industrial side track is $19.50 per car.

19

[fol. 126] Plaintiff cannot be deprived of a lawful delivery of its live stock by defendants at their live stock

Section 1, paragraphs (3) and (4), and section 6, paragraphs (1) and (7), of Interstate Commerce Act.

station at the Union Stock Yards, Chicago, Ill., because live stock may be delivered at the unloading facilities of the Omaha Packing Company at 26th and Halsted Streets (another and different station), approximately three miles from plaintiff's plants at the Union Stock Yards. The railroads do not maintain their own facilities at the Omaha plant and plaintiff has a right to use the facilities provided by the railroads adjacent to its plants. So long as the railroads maintain rates to their live stock terminal at the Union Stock Yards, plaintiff may elect to consign its live stock to that station and there demand the delivery required by law.'

(Supplement to plaintiff's brief, pp. 154-156.)

Hygrade Food Products Corp. v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Union Stock Yard & T. Co. v. *v. United States*, 308 U. S. 213, 84 L. ed. 198.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Allied Packers v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Plaintiff's brief, pp. 20, 22.)

Chicago Live Stock Exc. v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531. (Plaintiff's brief, pp. 36-37.)

ORDER PROPOSED BY PLAINTIFF

This case having come on to be heard upon the complaint, the intervening petitions, and the answers, and the evidence introduced by the parties, and having been taken under advisement by the court, and the court having duly considered the issues made by the pleadings, the evidence introduced, and the argument of counsel, and having filed herein its findings of fact, conclusions of law, and opinion, and being fully advised in the premises:

It is therefore ordered, adjudged, and decreed that the order of the Interstate Commerce Commission of April 8, [fols. 127-128] 1940 dismissing the complaint in No. 27862, *Swift & Co., et al.* v. *Alton R. Co., et al.*, and the order of said Commission of July 8, 1940 in said proceeding, denying plaintiff's petition therein for reargument, reconsideration, and reversal of the order of April 8, 1940, be and they are hereby permanently suspended, enjoined, set aside, and annulled; that this proceeding be, and it is hereby,

remanded to the Interstate Commerce Commission for further hearing and decision by the Commission in conformity with the findings of fact, conclusions of law, and opinion of this court; and that plaintiff have and recover of the defendants the proper costs of this suit.

Enter: ——, *United States Circuit Judge.* ——, *United States District Judge.* ——, *United States District Judge.*

Dated —— —, 1941.

Respectfully submitted, Edgar B. Kixmiller, Ross Dean Rynder, *Attorneys for Plaintiff*, 4115 Packers Avenue, Chicago, Illinois.

May 8, 1941.

[fol. 129] In the District Court of the United States

[Title omitted]

Findings of Fact and Conclusions of Law—June 4, 1941

Pursuant to the rules of civil procedure, the court makes the following findings of fact and states the following conclusions of law upon the entire record in the above-entitled action.

Findings of Fact

1. By complaint filed with the Interstate Commerce Commission on September 20, 1937, against the Alton Railroad Company and other common carriers by railroad, Swift & Company, G. H. Hammond Company and Omaha Packing Company, wholly owned subsidiaries of Swift & Company, alleged that the railroads defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards in Chicago, owned and operated by the Union Stock Yards & Transit Company at Chicago, to the nearest public street, in connection with direct shipments of livestock consigned to complainants, free from any charge other than the line-haul rate, had resulted and results in [fol. 130] an unreasonable practice in violation of the Interstate Commerce Act.

2. Complainants Swift & Company and Omaha Packing Company are engaged in the packing house business and

operate packing plants for the processing of livestock at Chicago, Ill., which plants are located adjacent to the Union Stock Yards in Chicago.

3. The complaint was docketed by the Interstate Commerce Commission as No. 27862, *Swift & Company et al* v. *Alton Railroad Company et al.*, the defendants being common carriers by railroad engaged in the transportation of livestock to Chicago. The Union Stock Yard & Transit Company was not named as a defendant.

4. In the complaint heretofore referred to, the Commission was asked to require the railroads defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. The Commission was also asked to award reparation to each complainant for the charges paid by reason of the unlawful practice during the period of two years preceding the filing of the complaint and during the pendency of the proceeding.

5. Answers to the complaint were filed by the railroads defendants; Armour and Company was permitted to intervene in support of the complaint, full hearings were held before an examiner of the Commission, briefs were filed, and examiner's proposed report was issued, to which complainants filed exceptions, which exceptions were replied to by defendants, and the proceeding was orally argued before the entire Commission.

6. On April 8, 1940, the Commission issued its report, 238 I. C. C. 179, annexed to and made a part of the bill of complaint as Exhibit B, in which the Commission, among other [fol. 131] things, found:

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in the report, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the

stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

7. The Commission further found that after the livestock arrives at the Union Stock Yards, it proceeds to unloading platforms on the property of and owned by the Yard Company where the car door is opened by employees of the Yard Company and the livestock driven by its employees through chutes into unloading pens adjacent to the unloading platforms. As to the shipments for Swift & Company, if its employees are at the unloading platforms when the animals are placed therein, they are driven by Swift's employees from the unloading pens through the property of the Yard Company to the plant of Swift & Company located outside the stock yards. If Swift's employees are not at the unloading pens, and the volume of livestock necessitates immediate removal of the animals, they are taken from the unloading pens to holding pens by employees of the Yard Company; later they are driven from the holding pens through the Yard Company's property to Swift's plant by Swift's employees. Whether possession is taken at the unloading pens or at the holding pens, Swift is required to pay a yardage charge to the Yard Company on each animal, under authority of a tariff on file with the Secretary of Agriculture.

8. The Commission's report states that it is physically impossible to remove livestock from the unloading pens in [fol. 132] the stock yards to complainant's plant or to public streets except by use of the Yard Company's property. It is shown that these yardage charges are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards, which is the largest livestock market in the United States and the only public market for the sale of livestock in the City of Chicago. These charges, so the Commission found, are compensation for services performed by and the use of facilities of the Yard Company after the stock is placed in unloading pens. For the efficient and orderly handling of the large number of shipments arriving at the stock yards, employees of the

Yard Company are the only ones permitted to handle the livestock when it reaches the unloading platforms.

9. The Commission further found that for more than seventy years, or during its entire existence, the Union Stock Yards Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises. Most of plaintiff's shipments are now being made to the plant of its subsidiary, the Omaha Packing Company, located about two miles from the Union Stock Yards, and the stock received at the plant of the Omaha Packing Company is transported by motor truck over the streets of Chicago to the Swift plant without the payment of the yardage charge.

10. The Commission further found that for more than seventy years it has been the practice of the Union Stock Yards Company to collect a yardage charge on every animal unloaded from the car at Union Stock Yards, and this practice was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice.

11. The Commission's report also states:

During a substantial portion of the period referred to, complainant not only paid the yardage charge without [fol. 133] protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company.

12. The report also finds that because of the physical conditions existing in the Union Stock Yards, the railroads could not provide egress from the unloading pens to a public street without use of the property of the Yard Company.

13. The Commission in its report, after reviewing the evidence, found:

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards had ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance

of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads * * *.

14. The Commission's report points out that the line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded, and they have no voice in the nature of the yard services provided or in the manner in which they are performed; they have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services.

15. The Commission also found that under the railroad tariffs, the shippers of livestock have the choice of consigning their shipments to the Union Stock Yards, and having them unloaded there without extra charge, or taking delivery on team tracks at other points in the Chicago district, in which event they unload the cars themselves; "that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there." [fol. 134] 16. After reviewing the evidence of record, including the long-standing practices and customs in the industry, the Commission found and held that Section 15(5) of the Interstate Commerce Act could not be construed as imposing an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable unloading pens to the boundary of the Yard Company's property.

17. The Commission further found that for almost 50 years prior to the decision of the Supreme Court in 1912 holding the Yard Company to be a common carrier, the company had maintained two charges, one for unloading the livestock and a yardage charge imposed upon all animals in addition to the unloading charge. Also that no tariff of the Yard Company on file with the Commission ever included yardage charges.

18. The Commission found that the obligation of the carriers in transporting ordinary livestock in carload lots to

public stock yards is to make delivery into pens on the stock yards' property which are suitable to receive the stock in a safe manner; that there is a distinction between transportation to public stock yards generally and transportation to other than public stock yards, and that the carriers' duty with respect to livestock consigned to the Chicago Union Stock Yards ended upon delivery into suitable pens and did not include the removal of the livestock from such pens to a point outside the Stock Yards.

Following this finding the Commission's report states:

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15(5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

[fol. 135] 19. On the same date as that on which its report was issued, namely April 8, 1940, the Commission issued an order dismissing the complaint, whereupon a petition for reargument and reconsideration was filed by complainants, replied to by railroads defendants, and denied by the Commission on July 8, 1940. This suit was instituted upon complaint filed October 7, 1940, by Swift & Company and Omaha Packing Company, organized and existing under and pursuant to the laws of the States of Illinois and Kentucky, whose principal offices and places of business are in Chicago. The matter covered by the aforesaid order of the Commission, now sought to be set aside, was entered upon the petition of complainants, residents of the Northern District of Illinois, Eastern Division, within the meaning of Section 43 of Title 28 of the U. S. Code, and this court has jurisdiction.

20. Defendant, United States of America, is sued herein pursuant to Sections 43 to 48, Title 28 of the U. S. Code.

21. The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, U. S. Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

22. The Alton Railroad Company and other common carriers by railroad serving the Union Stock Yards intervened as parties defendant, and filed answers to the bill of complaint.

23. Complainants herein prayed, among other things, that upon final hearing this court adjudge, order and decree that said order of the Commission of April 8, 1940, is, and at all times has been beyond the lawful authority of the Commission, is null and void, and should be perpetually set aside and annulled.

24. The United States of America and the Interstate [fol. 136] Commerce Commission filed their respective answers to the complaint. Said answers, in substance, admitted the making of the report and order of the Commission complained of; denied that said order was made without adequate findings and evidence to support it; denied that said order was in any other respect unlawful, and by amended answer alleged that the court had no authority, in so far as reparation was sought, to grant the relief prayed. The answers of these defendants, as well as the answer of intervening railroads defendants, alleged that said order of April 8, 1940, was made after full hearing and consideration of all the evidence before the Commission and of all the arguments advanced by the parties, and that it was supported by adequate findings and substantial evidence.

25. On April 21, 1941, the cause came on for final hearing upon the merits before this court, specially-constituted of three judges, as required by the Urgent Deficiencies Act of October 22, 1913. On such hearing there was before the court, and the court considered, the entire record of the evidence before the Commission, including the transcript of testimony taken before the Commission and the exhibits introduced in evidence before the Commission.

Conclusions of Law

1. The findings made by the Commission are adequate to support its conclusion that the transportation of direct

shipments of livestock to the Union Stock Yards at Chicago is completed when the livestock is placed in the unloading pens, and that yardage charges assessed by the Stock Yards Company for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, is not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of livestock transported to the Union Stock Yards [fol. 137] did not result in an unreasonable practice.

2. The Commission had evidence before it sufficient to sustain its findings.

3. The order of the Commission dated April 8, 1940, was within the lawful authority of the Commission, was not arbitrary or capricious and does not deprive plaintiffs of their property without due process of law.

4. Plaintiffs are not entitled to the setting aside or annulling of said order of April 8, 1940, or to a permanent injunction against its enforcement, or to any relief.

A decree dismissing the complaint is entered herein.

William M. Sparks, United States Circuit Judge.
Philip L. Sullivan, United States District Judge.
M. L. Igoe, United States District Judge.

Dated this 4th day of June, 1941. Chicago, Ill.

[fols. 138-139] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 2188

SWIFT AND COMPANY and OMAHA PACKING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

FINAL DECREE—June 4, 1941

The above-entitled action having been brought to set aside and annul and to perpetually enjoin the enforcement of an

order of the Interstate Commerce Commission, dated April 8, 1940, in Docket No. 27862, *Swift & Company et al* v. *Alton Railroad Company et al.*, 238 I. C. C. 179, and the cause, pursuant to 28 U. S. C. A. section 47, having been heard upon final hearing before a court of three judges on April 21, 1941, as in said section provided, the court upon consideration of the complaint

Orders, adjudges and decrees that the complaint should be, and the same is hereby, dismissed.

William M. Sparks, United States Circuit Judge.
Philip L. Sullivan, United States District Judge.
M. L. Igoe, United States District Judge.

Dated this 4th day of June, 1941. Chicago, Ill.

[fol. 140] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF PETITION FOR APPEAL—Filed July 10, 1941

To Honorable Francis Biddle, Solicitor General of the United States; Honorable Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Douglas F. Smith, Esquire, Solicitor for The Alton Railroad Company and others.

You are hereby notified that on the 10th day of July, 1941, at 10:00 o'clock a.m, or as soon thereafter as counsel can be heard, we shall present to the Honorable William M. Sparks, Circuit Judge, Honorable Philip L. Sullivan, District Judge, and Honorable M. L. Igoe, District Judge, the petition of the petitioners herein for an appeal from the final decree made and entered in the District Court in the above entitled case on the 4th day of June, 1941, to the Supreme Court of the United States; and ask that an order be entered herein allowing said appeal, making same returnable within thirty (30) days from July 10, 1941.

[fols. 141-144] A copy of said petition for appeal and of the assignment of errors therein referred to, and a copy of the order allowing the appeal, are attached hereto.

Edgar B. Kixmiller, Ross Dean Rynder, Solicitors for Swift and Company and Omaha Packing Company. Paul E. Blanchard, Solicitor for Armour and Company.

July 8, 1941.

[fol. 144a] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed July 10, 1941

To the Honorable Judges of the District Court of the United States for the Eastern Division of Illinois, Northern District:

Your petitioners, Swift and Company and Omaha Packing Company, and Armour and Company, an intervener herein, jointly and severally respectfully show:

That on, to wit, October 7, 1940, petitioners, Swift and Company and Omaha Packing Company, filed in this court their complaint in this proceeding for the purpose of suspending, enjoining, setting aside, and annulling a certain decision and order of the Interstate Commerce Commission, entered on April 8, 1940, in a proceeding before said Interstate Commerce Commission, entitled "No. 27862, *Swift and Co., et al. v. Alton Railroad Co., et al.*", and a certain order of said Commission in said proceeding of July 8, 1940, which denied a petition of complainants in said proceeding for reargument, reconsideration, and reversal of the order.

That in said complaint before this court it was alleged in substance that said decision and order of said Commission [fol. 145] were based upon findings of fact unsupported by any evidence of record; based upon findings of fact irrelevant to any issue in said case; based upon conclusions of law contrary to the statutes and decisions governing the issues in said case; were arbitrary; exceeded the power of the Commission; were confiscatory of the property of petitioners; were without due process of law; and deprived petitioners of their property without due process of law, in violation of the fifth amendment to the Constitution of the United States; and that said decision and order were therefore void and of no effect; that in said complaint before this court it was prayed that this court issue a subpoena, directed to the defendants therein, the United States of America and the Interstate Commerce Commission, requiring said defendants, on a day certain therein to be specified, to be and appear before this court and to answer said complaint; that this court direct that due and proper notice of said complaint and proceeding issue and

be served forthwith, as prescribed in the Act of October 22, 1913 (28 U. S. C. A., secs. 41 (28) and 43 to 48, inclusive); that a court constituted as required by said Act of October 22, 1913 (28 U. S. C. A., sec. 47) be convened, and that said court so constituted and convened should hear this complaint upon due and legal notice to defendants; that the judge of this court should call to his assistance two other judges, one of whom should be a Circuit Judge; that, upon final hearing of this complaint, the court should enter a decree permanently suspending, enjoining, setting aside, and annulling the said decision and order of the Interstate Commerce Commission; that petitioners should have and [fol. 146] recover of the defendants the proper costs of this suit; and that petitioners should have such other and further relief in the premises as to equity may appertain and as might be deemed by this court fit and proper.

That thereupon the Honorable Philip L. Sullivan, District Judge, called to his assistance the Honorable William M. Sparks, Circuit Judge, and the Honorable M. L. Igoe, District Judge, in order to constitute a court in accordance with the statute; that, on April 21, 1941, this cause came on to be heard before the United States District Court composed as aforesaid, and that the court thereupon heard counsel for the parties and was duly advised in the premises.

That thereafter on, to wit, June 4, 1941, said court entered its findings of fact and conclusions of law and its final decree in which it ordered, adjudged, and decreed that the complaint herein be dismissed.

That said final decree is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors and prayer for reversal, filed with the clerk pursuant to rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioners may obtain relief in the premises and have opportunity to show the [fols. 147-148] errors complained of, your petitioners pray for the allowance of an appeal in said cause to the Supreme Court of the United States agreeably to the statutes and

rules of said court in such cases made and provided; and petitioners here tender a proper bond on appeal.

Dated July 3, 1941, at Chicago, Illinois.

Edgar B. Kixmiller, Ross Dean Rynder, Solicitors for Swift and Company and Omaha Packing Company. Paul E. Blanchard, Solicitor for Armour and Company.

[fol. 149] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—July 10, 1941

The petition of Swift and Company and Omaha Packing Company and of Armour and Company, an intervener herein, for an appeal in the above entitled cause to the Supreme Court of the United States from the final decree of the District Court of the United States for the Eastern Division of Illinois, Northern District, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Eastern Division of Illinois, Northern District, entered in this cause on the 4th day of June, 1941; and that the Clerk of the said District Court of the United States for the Eastern Division of Illinois, Northern District, shall, [fols. 150-151] within thirty (30) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that said petitioners shall give a good and sufficient cost bond in the sum of Five Hundred Dollars ($500.00), conditioned as required by law.

Done by the court this 10th day of July, 1941.

William M. Sparks, Circuit Judge. Philip L. Sullivan, District Judge. M. L. Igoe, District Judge.

[fols. 152-157] Cost Bonds on appeal for $500, approved July 10, 1941, and filed July 10, 1941, omitted in printing.

[fol. 158] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1941

And now, on this, the 10th day of July, A. D. 1941, come the petitioners, Swift and Company and Omaha Packing Company, by their solicitors, Edgar B. Kixmiller and Ross Dean Rynder, and comes also the intervener, Armour and Company, by its solicitor, Paul E. Blanchard, jointly and severally, and say that the decree entered in the above cause on the 4th day of June, A. D. 1941, is erroneous and unjust to petitioners.

No. 1. Because the court erred in failing to find that no stock yard services, subject to the Packers and Stockyards Act, 1921 (U. S. C. A. tit. 7), are desired or requested by petitioners.

No. 2. Because the court erred in failing to find that the railroad team tracks mentioned in the decision of the Interstate Commerce Commission are not equipped with chutes, pens, or other facilities for unloading and delivery of live stock.

[fol. 159] No. 3. Because the court erred in failing to find that the industry tracks of petitioner Swift and Company are not equipped with chutes, pens, or other facilities for unloading and delivery of live stock.

No. 4. Because the court erred in failing to find that the live stock rates to Chicago applicable to the railroad unloading pens at the Union Stock Yards do not apply to deliveries upon the industrial side tracks of petitioners at their plants at the Union Stock Yards; and that the rates for deliveries upon such industry tracks consist of the Chicago rates applicable to railroad defendants' unloading pens at the Union Stock Yards, plus a switching charge of $19.50 per car from the unloading pens to the industrial side tracks.

No. 5. Because the court erred in failing to find that the Union Stock Yard and Transit Company is a terminal of the line haul railroads, performs their railroad terminal services within the meaning of the Interstate Commerce Act (as their agent), and files with the Interstate Commerce Commission a tariff naming its charges for terminal services "as railroad's agent"; and that the Union Stock Yards is named in the railroad tariffs as a specific station to which the railroad rates on live stock to Chicago are applicable.

No. 6. Because the court erred in failing to find that the Union Stock Yards at Chicago have become the common live stock depot of the railroad defendants; and that the stock yard company, in supplying its yards, performs there the transportation service which the carriers are under a duty to render.

[fol. 160] No. 7. Because the court erred in failing to find that the Union Stock Yard and Transit Company functions in a dual capacity; that it is a public stock yard subject to the Packers and Stockyards Act, 1921, and to regulation by the Secretary of Agriculture thereunder as to stock yard services; and that for such services it publishes its stock yard tariff and files it with the Secretary of Agriculture.

No. 8. Because the court erred in failing to find that the Union Stock Yard and Transit Company also provides (as agent) terminal facilities for the railroads, which become in substance the property of the railroads under lease; and that, acting in this capacity, the Union Stock Yard and Transit Company has been held to be a common carrier by railroad subject to the Interstate Commerce Act and files its tariff with the Interstate Commerce Commission.

No. 9. Because the court erred in failing to find that the interstate transportation of live stock to the railroad defendants' station at the Union Stock Yards does not end until after unloading for delivery or tender to the consignee at said destination.

No. 10. Because the court erred in failing to find that the mere privilege of immediate removal from the unloading pens, "a mere way out to the public highways", is an essential part of the delivery.

No. 11. Because the court erred in failing to find that section 15 (5) of the Interstate Commerce Act did not super-

sede or modify the provisions of section 1 (3) of said act with respect to the delivery of live stock at public stock yards.

[fol. 161] No. 12. Because the court erred in failing to find that the legislative history of section 15 (5) of the Interstate Commerce Act does not support the conclusion of the Commission to the effect that section 15 (5) was intended to amend existing law so as to repeal or modify section 1 (3) of the Interstate Commerce Act or the law of the *Covington case* as to unloading and delivery of live stock by railroad common carriers at public stock yards.

No. 13. Because the court erred in failing to find that, if the present railroad rates to the railroad station at the Union Stock Yards do not afford compensation to the railroads for egress from the pens, the Interstate Commerce Commission may and should prescribe a reasonable additional charge for such egress.

No. 14. Because the court erred in failing to find that, if use of the terminal facilities of the Union Stock Yards for egress to the street after unloading of live stock is a part of transportation and if this use is a service for which reasonable compensation is justified, this charge, like the unloading charge, is a part of the reasonable transportation rate, determination of which is committed to the jurisdiction of the Interstate Commerce Commission.

No. 15. Because the court erred in failing to find that the charges here assailed, in so far as they were assessed for the use of stock yard facilities in effecting delivery of interstate shipments of live stock, were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act, and the Interstate Commerce Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

[fol. 162] No. 16. Because the court erred in failing to find that the fact that egress from the railroad defendants' unloading pens would necessarily be across property of their agent, Union Stock Yard and Transit Company, does not deprive the Commission of authority to make an order against said railroad defendants requiring egress for petitioners' shipments, with or without a rate change covering such service.

No. 17. Because the court erred in failing to find that the Commission erred in finding that the Secretary of Agriculture has asserted jurisdiction over and fixed charges for mere egress from railroad unloading pens at public stock yards to a public street for live stock upon which no "yardage service" (as defined in the act) is requested, desired, or received.

No. 18. Because the court erred in failing to find that the issues in the present case are not the same as those which were before the Commission and the court in *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, and *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382.

No. 19. Because the court erred in failing to find that section 406 (a) of the Packers and Stockyards Act, 1921 (U. S. C. A. tit. 7, § 226), reserves to the Interstate Commerce Commission power and jurisdiction over all matters relating to the transportation and delivery of live stock by railroad common carriers, including all services essentially a part of such transportation and delivery.

[fol. 163] No. 20. Because the court erred in failing to find that the contract of July 1, 1891 created no tri-party relation between the stock yards, the railroads, and petitioners; that the contract related solely to stock yard services, as distinguished from railroad common carrier services; that the railroads were not a party to said contract, gave no consideration in connection therewith, and received no benefit thereunder; that the question of egress from railroad unloading pens was not involved in said contract; and that the contract of July 1, 1891 throws no light upon whether section 15 (5) amended the law of the *Covington case* and section 1 (3) of the Interstate Commerce Act.

No. 21. Because the court erred in failing to find that petitioners are not estopped to prosecute this proceeding and to obtain the relief herein sought by reason of the contract (exhibit 47) between petitioner Swift and Company (and others) and The Chicago Junction Railways and Union Stock Yards Company, executed as of July 1, 1891 and which expired July 1, 1906.

No. 22. Because the court erred in failing to find that, if the Union Stock Yard and Transit Company was ever the

agent of petitioners for the receipt from the railroads of petitioners' shipments of live stock to Chicago, that agency was ended by petitioners' notices to the railroad defendants of May 9, 1933, May 16, 1933, and September 9, 1935.

No. 23. Because the court erred in failing to find that the railroads do not provide the delivery of live stock to which petitioners are entitled as a matter of law by placing cars of live stock upon railroad team tracks which are not equipped with any facilities for unloading, such as chutes, pens, or yards.

[fol. 164] No. 24. Because the court erred in failing to find that the railroads do not provide the delivery of live stock to which petitioners are entitled as a matter of law by placement upon industry tracks which are not equipped with unloading facilities, such as chutes, pens, or yards.

No. 25. Because the court erred in failing to find that petitioners have an unqualified right to consign their live stock to the Union Stock Yards Station of the railroads, rather than to an industrial side track (not equipped with unloading facilities) which would involve an additional switching charge of $19.50 per car above the railroad line haul rate to the railroads' terminal unloading facilities at the Union Stock Yards; and that where two stations are so named, one requiring the payment of a freight rate of $19.50 per car higher than the other, the shipper is under no obligation to select the station to which the higher rate applies merely to avoid the consequences of the carrier's failure to meet its obligations of delivery at the lower rated station.

No. 26. Because the court erred in failing to find that petitioner Swift and Company cannot be deprived of a lawful delivery of its live stock by railroad defendants at their live stock station at the Union Stock Yards, Chicago, Ill., because live stock may be delivered at the unloading facilities of the Omaha Packing Company at 26th and Halsted Streets (another and different station), approximately three miles from Swift and Company's plants at the Union Stock Yards; that the railroads do not maintain their own facilities at the Omaha plant and petitioner, Swift and Company has a right to use the facilities provided by the railroads adjacent to its plants; and that so long as the [fol. 165] railroads maintain rates to their live stock termi-

nal at the Union Stock Yards petitioner Swift and Company may elect to consign its live stock to that station and there demand the delivery required by law.

No. 27. Because the court erred in adopting its finding of fact No. 7 reading as follows:

"7. The Commission further found that after the livestock arrives at the Union Stock Yards, it proceeds to unloading platforms on the property of and owned by the Yard Company where the car door is opened by employees of the Yard Company and the livestock driven by its employees through chutes into unloading pens adjacent to the unloading platforms. As to the shipments for Swift & Company, if its employees are at the unloading platforms when the animals are placed therein, they are driven by Swift's employees from the unloading pens through the property of the Yard Company to the plant of Swift & Company located outside the stock yards. If Swift's employees are not at the unloading pens, and the volume of livestock necessitates immediate removal of the animals, they are taken from the unloading pens to holding pens by employees of the Yard Company; later they are driven from the holding pens through the Yard Company's property to Swift's plant by Swift's employees. Whether possession is taken at the unloading pens or at the holding pens, Swift is required to pay a yardage charge to the Yard Company on each animal, under authority of a tariff on file with the Secretary of Agriculture."

in that the service there described is that rendered at the present time because egress from the unloading pens to a public street is not afforded to petitioners and because such finding does not represent the service which would be afforded if such egress were permitted, as appears from the decision of the Commission.

No. 28. Because the court erred in adopting its finding of fact No. 8 reading as follows:

"8. The Commission's report states that it is physically impossible to remove livestock from the unloading pens in the stock yards to complainant's plant or to public streets [fol. 166] except by use of the Yard Company's property. It is shown that these yardage charges are assessed and collected by the Yard Company on every animal unloaded from

railroad cars at the stockyards, which is the largest live-stock market in the United States and the only public market for the sale of livestock in the City of Chicago. These charges, so the Commission found, are compensation for services performed by and the use of facilities of the Yard Company after the stock is placed in unloading pens. For the efficient and orderly handling of the large number of shipments arriving at the stock yards, employees of the Yard Company are the only ones permitted to handle the livestock when it reaches the unloading platforms."

in that the facts so found afford no lawful excuse for denial of the egress from the cars to a public street sought by petitioners.

No. 29. Because the court erred in adopting its finding of fact No. 9 reading as follows:

"9. The Commission further found that for more than seventy years, or during its entire existence, the Union Stock Yards Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises. Most of plaintiff's shipments are now being made to the plant of its subsidiary, the Omaha Packing Company, located about two miles from the Union Stock Yards, and the stock received at the plant of the Omaha Packing Company is transported by motor truck over the streets of Chicago to the Swift plant without the payment of the yardage charge."

in that said finding affords no legal basis for denial to petitioners of the egress from railroad cars to a public street either at the present railroad rate or at the present railroad rate plus an additional charge to be determined by the Commission.

No. 30. Because the court erred in adopting its finding of fact No. 10 reading as follows:

"10. The Commission further found that for more than seventy years it has been the practice of the Union Stock Yards Company to collect a yardage charge on every animal unloaded from the car at Union Stock Yards, and this practice was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice."

[fol. 167] in that the court failed to find that until 1933 petitioners desired the performance of a stock yard service by the Union Stock Yard and Transit Company but that since that time petitioners have been prepared to perform all services in connection with the acceptance of their live stock at the railroad unloading pens and the movement of said live stock therefrom to the public streets over the shortest or most convenient route to be determined by the railroad defendants, without the performance of any stock yard service by the railroad defendants' agent, Union Stock Yard and Transit Company.

No. 31. Because the court erred in adopting as a basis for its final decree its finding of fact No. 11 reading as follows:

"11. The Commission's report also states:

'During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company.'"

No. 32. Because the court erred in adopting as a basis for its final decree its finding of fact No. 12 reading as follows:

"12. The report also finds that because of the physical conditions existing in the Union Stock Yards, the railroads could not provide egress from the unloading pens to a public street without use of the property of the Yard Company."

No. 33. Because the court erred in adopting as a basis for its final decree its finding of fact No. 13 reading as follows:

"13. The Commission in its report, after reviewing the evidence, found:

[fol. 168] The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards had ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the

packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. * * *"

No. 34. Because the court erred in adopting as a basis for its final decree its finding of fact No. 14 reading as follows:

"14. The Commission's report points out that the line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded, and they have no voice in the nature of the yard services provided or in the manner in which they are performed; they have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services."

in that no stock yard service is desired or requested by petitioners and that, if the railroads are not compensated for such cost as may be involved in the egress sought by petitioners, it is the duty of the Commission to fix a reasonable charge for such egress.

No. 35. Because the court erred in adopting as a basis for its final decree its finding of fact No. 15 reading as follows:

"15. The Commission also found that under the railroad tariffs, the shippers of livestock have the choice of consigning their shipments to the Union Stock Yards, and having them unloaded there without extra charge, or taking delivery on team tracks at other points in the Chicago district, in which event they unload the cars themselves; 'that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.'"

[fol. 169] in that the court failed to find, in accordance with the record, that the railroad defendants maintain no unloading facilities for the delivery of live stock on team tracks, or at other points in the Chicago district, and in failing to find that petitioners have a right to elect to take

delivery at the one point in the Chicago district which the railroad defendants have established as their terminal for the delivery of live stock.

No. 36. Because the court erred in adopting as a basis for its final decree its finding of fact No. 16 reading as follows:

"16. After reviewing the evidence of record, including the long-standing practices and customs in the industry, the Commission found and held that Section 15(5) of the Interstate Commerce Act could not be construed as

imposing an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable unloading pens to the boundary of the Yard Company's property."

in that section 15 (5) of the Interstate Commerce Act does not relate to or control the right of petitioners to egress from the railroad defendants' unloading pens to a public street at the present railroad rates or at such rates plus a reasonable charge to be fixed by the Commission.

No. 37. Because the court erred in adopting as a basis for its final decree its finding of fact No. 17 reading as follows:

"17. The Commission further found that for almost 50 years prior to the decision of the Supreme Court in 1912 holding the Yard Company to be a common carrier, the company had maintained two charges, one for unloading the livestock and a yardage charge imposed upon all animals in addition to the unloading charge. Also that no tariff of the Yard Company on file with the Commission ever included yardage charges."

[fol. 170] No. 38. Because the court erred in adopting as a basis for its final decree its finding of fact No. 18 reading as follows:

"18. The Commission found that the obligation of the carriers in transporting ordinary livestock in carload lots to public stock yards is to make delivery into pens on the stock yards' property which are suitable to receive the stock in a safe manner; that there is a distinction between

transportation to public stock yards generally and transportation to other than public stock yards, and that the carrier's duty with respect to livestock consigned to the Chicago Union Stock Yards ended upon delivery into suitable pens and did not include the removal of the livestock from such pens to a point outside the Stock Yards.

"Following this finding the Commission's report states:

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15(5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own."

No. 39. Because the court erred in adopting its conclusion of law No. 1 reading as follows:

"1. The findings made by the Commission are adequate to support its conclusion that the transportation of direct shipments of livestock to the Union Stock Yards at Chicago is completed when the livestock is placed in the unloading pens, and that yardage charges assessed by the Stock Yards Company for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, is not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of livestock transported to the Union Stock Yards did not result in an unreasonable practice."

[fol. 171] No. 40. Because the court erred in adopting its conclusion of law No. 2 reading as follows:

"2. The Commission had evidence before it sufficient to sustain its findings."

No. 41. Because the court erred in adopting its conclusion of law No. 3 reading as follows:

"3. The order of the Commission dated April 8, 1940, was within the lawful authority of the Commission, was not arbitrary or capricious and does not deprive plaintiffs of their property without due process of law."

No. 42. Because the court erred in adopting its conclusion of law No. 4 reading as follows:

"4. Plaintiffs are not entitled to the setting aside or annulling of said order of April 8, 1940, or to a permanent injunction against its enforcement, or to any relief."

No. 43. Because the court erred in entering its final decree in which it ordered, adjudged, and decreed that the complaint be dismissed.

Conclusion

Wherefore petitioners and intervener pray that the said decree entered herein on June 4, 1941, be reversed and that said District Court of the United States for the Eastern Division of Illinois, Northern District, be directed to enter a decree granting the petition of petitioners and intervener in said court, and that said order of the Interstate Commerce Commission of April 8, 1940 be declared void and [fols. 172-188] perpetually set aside, suspended, and annulled, and that said District Court be directed to remand said complaint for further hearing and decision by the Commission in accordance with the controlling and correct principles of law; and that your petitioners and intervener be granted such other and further relief as may be appropriate.

Edgar B. Kixmiller, Ross Dean Rynder, Solicitors for Swift and Company and Omaha Packing Company. Paul E. Blanchard, Solicitor for Armour and Company.

[fols. 189-190] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO ATTORNEY GENERAL OF ILLINOIS—Filed July 10, 1941

To the Attorney General of the State of Illinois, Springfield, Illinois:

Pursuant to rule 12, paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction in the above entitled cause.

Your attention is directed to the provisions of rule 12, paragraph 3, reading as follows:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in rule 7, paragraph 3."

Edgar B. Kixmiller, Ross Dean Rynder, Solicitors for Swift and Company and Omaha Packing Company. Paul E. Blanchard, Solicitor for Armour and Company.

Received—A copy of the foregoing notice, together with a copy of the petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction, this 7 day of July, 1941.

George F. Barrett, Attorney General of the State of Illinois.

[fol. 191] IN THE DISTRICT COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD, AND CONSENT THERETO—Filed July 24, 1941

For satisfactory reasons appearing to the undersigned, the time for filing the record in this case in the Supreme

Court of the United States pursuant to the order allowing appeal, is extended until September 9, 1941.

Dated this 23 day of July, 1941.

William M. Sparks, United States Circuit Judge.

[fols. 192-193] It is stipulated and agreed by and between the attorneys for the United States of America, the Interstate Commerce Commission, the railroad defendants, and the petitioners herein that the time of the petitioners to file a transcript of the record on appeal in the Supreme Court of the United States be, and the same hereby is, extended to and including the 9th day of September, 1941.

Charles Fahy, Acting Solicitor General of the United States. J. Stanley Payne, Acting Chief Counsel, Interstate Commerce Commission. Kenneth F. Burgess, Douglas F. Smith, Solicitor- for The Alton Railroad Company and others. Edgar B. Kixmiller, Ross D. Rynder, Paul E. Blanchard, Solicitors for Petitioners.

July 16, 1941.

[fol. 194] In the District Court of the United States

[Title omitted]

Order Approving Record on Appeal and Directing that Certain Documents Be Certified as Original Exhibits with Notice on Opposing Counsel—August 11, 1941

This cause coming on for hearing on the motion of petitioners (appellants) for an order approving the record filed herein and certifying original documents to the Supreme Court of the United States, and the court being advised in the premises,

It Is Ordered:

1. That the record in this court, together with the original exhibits offered in evidence, consisting of exhibit "A" in the hearing before this court, which is the transcript of the oral evidence taken before the Interstate Commerce Commission in No. 27862, *Swift and Co. v. Alton R. Co.*, 238 I. C. C. 179, and exhibit "B" in the hearing before this court, being exhibits 1 to 92, inclusive, in the hearing before

the Interstate Commerce Commission, to be certified separately to the Supreme Court of the United States, is a true and complete statement of all the evidence which is essential to the decision of the questions presented by the appeal, and that said statement of said evidence be and it is hereby approved.

[fol. 195] 2. That the clerk of this court, in preparing the transcript of the record on the appeal herein to the Supreme Court of the United States, shall certify to said court all of the record before this court, and said transcript of evidence before the Interstate Commerce Commission and said exhibits in connection therewith, designated respectively exhibits "A" and "B" in the hearing before this court; that said exhibits shall be certified and forwarded by the clerk of this court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record, but separately therefrom, and that any party hereto may refer to said original exhibits in their briefs and arguments with like effect as though they were printed as part of the record.

Enter:

William M. Sparks, United States Circuit Judge.
Philip L. Sullivan, United States District Judge.
M. L. Igoe, United States District Judge.

August 11th, 1941.

[fol. 196] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF ORDER APPROVING RECORD ON APPEAL, ETC.

To Honorable Francis Biddle, Solicitor General of the United States; Honorable Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Douglas F. Smith, Esquire, Solicitor for The Alton Railroad Company and Others:

Please take notice that petitioners (appellants) have lodged in the Clerk's office of the United States District Court for the Eastern Division of Illinois, Northern District, at Chicago, Ill., for examination of the parties hereto, the record, evidence, and exhibits to be included in the tran-

script of record on appeal to the Supreme Court of the United States from the final decree entered in the above proceeding on June 4, 1941.

Please further take notice that on the 11th day of August, 1941, at 10:00 a. m., or as soon thereafter as counsel can be heard, at the court room of said United States District Court in the United States Court House in the city of Chicago, Ill., petitioners (appellants) will move the court to enter an order (copy of which is hereto attached) approving [fols. 197-198] said record on appeal and providing for the certification to the Supreme Court of the United States of certain of the original exhibits filed upon the trial of said cause in said District Court, said exhibits to be certified and forwarded by the Clerk of the District Court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record, but separately therefrom.

Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for Petitioners.

Receipt and service of the foregoing notice and copy of the order therein referred to are acknowledged by the undersigned, this 4th day of August, 1941.

Charles Fahy, Acting Solicitor General of the United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Sidley, McPherson, Austin & Burgess, Solicitor- for The Alton Railroad Company and Others.

[fol. 199] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 31, 1941

To the Clerk of the District Court of the United States for the Eastern Division of Illinois, Northern District:

Please prepare a transcript of record in the above entitled cause on appeal to the Supreme Court of the United States, including therein the following:

1. Complaint herein of Swift and Company and Omaha Packing Company against the United States of America and Interstate Commerce Commission, including exhibits "A" and "B" thereto.

2. Answer of the United States of America, dated December 12, 1940.

3. Amendment to answer of United States of America, dated March 28, 1941.

4. Answer of the Interstate Commerce Commission, dated December 5, 1940.

5. Amendments to answer of Interstate Commerce Commission, dated March 31, 1941.

6. Motion of The Alton Railroad Company and others to intervene as parties defendant.

7. Order permitting intervention by The Alton Railroad Company and others.

8. Answer of The Alton Railroad Company and other intervening defendants.

[fol. 200] 9. Order granting motion of The Alton Railroad Company and other intervening defendants for leave to amend answer.

10. Amended answer of The Alton Railroad Company and other intervening defendants.

11. Petition of Armour and Company for leave to intervene, dated April 21, 1941.

12. Transcript of oral evidence before the Interstate Commerce Commission in No. 27862, *Swift and Co. v. Alton R. Co.*, marked exhibit "A" in the hearing before this court, to be certified as an original document and not as a part of the transcript of record but separately therefrom.

13. Exhibits 1 to 92, inclusive, in said proceeding before the Interstate Commerce Commission, marked exhibit "B" in the hearing before this court, to be certified as original documents and not as a part of the transcript of record but separately therefrom.

14. Findings of fact, conclusions of law, and order proposed by plaintiffs.

15. Findings of fact, conclusions of law, and final decree of the District Court, entered and filed on June 4, 1941.

16. Notice of petition for appeal, dated July 3, 1941.

17. Acknowledgment by counsel for United States, the Interstate Commerce Commission, and The Alton Railroad Company and others, of notice of petition for appeal, notice of appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction of Supreme Court on appeal, dated July 5, 1941.

18. Petition for appeal, dated July 3, 1941.

19. Order allowing appeal, entered July 10, 1941.

20. Bonds on appeal, approved July 10, 1941.

21. Assignment of errors, filed July 10, 1941.

22. Statement as to jurisdiction of the United States Supreme Court on appeal, filed July 10, 1941.

23. Notice of appeal pursuant to rule 12, paragraph 2, of the rules of the Supreme Court of the United States, addressed to the Solicitor General of the United States, Chief Counsel for the Interstate Commerce Commission, and the solicitor for The Alton Railroad Company and others, filed July 10, 1941.

[fols. 201-202] 24. Notice of appeal pursuant to rule 12, paragraph 2, of the rules of the Supreme Court of the United States, addressed to the Attorney General of the state of Illinois, and acknowledgment thereof, dated July 7, 1941.

25. Citation on appeal, filed July 10, 1941.

26. Acknowledgment of service of citation on appeal by Solicitor General of the United States, Chief Counsel for the Interstate Commerce Commission, and solicitor for The Alton Railroad Company and others.

27. Order extending to September 9, 1941 time to file transcript of record, entered July 23, 1941, and consent thereto.

28. Notice to defendants of appearence before court for entry of order approving record on appeal and acknowledgment of service thereof.

29. Order approving the record on appeal and providing for certification of original exhibits to the Supreme Court of the United States, entered August —, 1941.

30. This praecipe for transcript of record.

Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for Petitioners (Appellants).

Receipt and service of a copy of the foregoing praecipe are hereby acknowledged this 30th day of July, 1941.

Charles Fahy, Acting Solicitor General of the United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Sidley, McPherson, Austin & Burgess, Solicitor for The Alton Railroad Company and Others.

[fols. 203-204] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING ARMOUR AND COMPANY LEAVE TO INTERVENE —April 21, 1941

This matter came on to be heard before this Court, in open court, this 21st day of April, 1941, on petition of petitioner Armour and Company, and it appearing to the Court that Armour and Company was a party to the proceeding before the Commission, here under review, to the extent stated in said petition and by reason thereof the said petitioner is entitled to intervene herein as of right, under the provisions of Section 45a of Title 28, United States Code Annotated (Sections 212 and 213, Judicial Code); Now Therefore:

It Is Ordered that the said Armour and Company be and is hereby permitted to intervene herein.

Dated at Chicago, Illinois, April 21, 1941.

Philip L. Sullivan, District Judge.

[fol. 205] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed August 11, 1941

To the Clerk of the District Court of the United States for the Eastern Division of Illinois, Northern District:

In addition to the documents described in the praecipe heretofore filed by petitioners herein on July 31, 1941, please include in the transcript of record in the above entitled cause on appeal to the Supreme Court of the United States the following:

Order allowing petition of Armour and Company for leave to intervene, entered April 21, 1941.

This supplemental praecipe for transcript of record.

Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for Petitioners (Appellants).

[fols. 206-207] Receipt and service of a copy of the foregoing supplemental praecipe are hereby acknowledged this 7th day of August, 1941.

Charles Fahy, Acting Solicitor General of the United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Sidley, McPherson, Austin & Burgess, Solicitor- for The Alton Railroad Company and others.

[fol. 208] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD, AND CONSENT THERETO

For satisfactory reasons appearing to the undersigned the time for filing the record in this case in the Supreme Court of the United States pursuant to the order allowing appeal, is further extended until October 9, 1941.

Dated this 11th day of August, 1941.

Enter: Philip L. Sullivan, United States District Judge.

[fols. 209-210] It is stipulated and agreed by and between the attorneys for the United States of America, the Interstate Commerce Commission, the railroad defendants, and the petitioners herein that the time of the petitioners to file a transcript of the record on appeal in the Supreme Court of the United States be, and the same hereby is, extended to and including the 9th day of October, 1941.

Charles Fahy, Acting Solicitor General of the United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Sidley, McPherson, Austin & Burgess, Solicitor- for The Alton Railroad Company and others. Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for Petitioners.

August 5, 1941.

[fol. 211] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SECOND SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD
—Filed August 15, 1941

To the Clerk of the District Court of the United States for the Eastern Division of Illinois, Northern District:

In addition to the documents described in the praecipe heretofore filed by petitioners herein on July 31, 1941, and the supplemental praecipe filed by petitioners herein on August 11, 1941, please include in the transcript of record in the above entitled cause on appeal to the Supreme Court of the United States the following:

Order extending time to file transcript of record until October 9, 1941.

Order approving record on appeal and directing that certain documents be certified as original exhibits.

This second supplemental praecipe for transcript of record.

Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for Petitioners (Appellants).

[fol. 212] Receipt and service of a copy of the foregoing second supplemental praecipe are hereby acknowledged this 13th day of August, 1941.

Charles Fahy, Acting Solicitor General of the United States (K. C. C.); Daniel H. Kunkel, Counsel, Interstate Commerce Commission; Sidley, McPherson, Austin & Burgess, Solicitor- for The Alton Railroad Company and others.

[fols. 213-214] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 215-217] Citation in usual form showing service on United States, Interstate Commerce Commission and Alton R. R. Co. et al. omitted in printing.

[fol. 217a] Secretary's Certificate to following transcript omitted in printing.

[fol. 1] EXHIBIT "A"

Before the Interstate Commerce Commission

Docket No. 27862

SWIFT AND COMPANY, et al., Complainants,

vs.

THE ALTON RAILROAD COMPANY, et al., Defendants

Chicago, Illinois, May 31, 1938. 9 a. m.,
Central Standard Time.

Before Paul O. Carter, Examiner, Interstate Commerce Commission

Met Pursuant to Notice

APPEARANCES:

R. D. Rynder, % Swift and Company, U. S. Yards, Chicago, Illinois, appearing for complainants.

Kenneth F. Burgess, Robert Thomas, and Douglas F. Smith, 11 South LaSalle Street, Chicago, Illinois, appearing for defendants.

Paul E. Blanchard, Armour Building, U. S. Yards, Chicago, Illinois, appearing for Armour & Company, special intervener.

George Jeck, 547 Jackson Boulevard, Chicago, Illinois, appearing for Chicago, Burlington & Quincy Railroad Com-
[fol. 2] pany.

H. R. Park, Exchange Building, U. S. Yards, Chicago, Illinois, appearing for the Chicago Stock Exchange.

[fols. 3-4] COLLOQUY

Exam. Carter: Come to order, please, gentlemen. The Interstate Commerce Commission has set for hearing at this time and place, Docket No. 27862, Swift and Company, et al., versus The Alton Railroad Company, et al. Who appears for complainants?

Mr. Rynder: R. D. Rynder, U. S. Yards, Chicago, Illinois, appearing for complainants.

Exam. Carter: Are there any interveners?

(No response.)

Exam. Carter: Are there any interveners?

Mr. Blanchard: I beg your pardon. Paul E. Blanchard, Armour Building, U. S. Yards, Chicago, Illinois. I wish to file a petition of intervention on behalf of Armour & Company, and perhaps a word of explanation should be in order. This petition does not broaden the issues. In fact, it does not even ask affirmative relief from the hands of the Commission, the reason being that we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition, asking not only adjunctive relief against what we regard as the continuous breach of the contracts of transportation, but we have asked for damages for the past because of the breaches of such contracts by the defendant carriers. I think I should explain, in justice to the Commission, why I [fol. 5] feel it advisable to go the courts, instead of the Commission. As this record will show, this question has been the subject of repeated correspondence and conferences. It has been a matter that has been most controversial for five years——

Mr. Smith: The defendants object to the intervener making any statement as to why he is not seeking relief here, but seeking relief in the courts, as immaterial.

Exam. Carter: I will sustain that objection.

Mr. Blanchard: Very well.

Exam. Carter: Have you examined the petition of intervention?

Mr. Rynder: I do not have one.

Mr. Blanchard: Let the record show that counsel for Armour & Company offers to explain to the Commission that its failure to ask for relief from the Commission was not due to any lack of confidence in the Commission, or lack of confidence in its justness in handling matters of this sort, but merely was because the complainant felt this case would have to go to court anyhow, because the carriers would not obey any order of the Commission until they had tested it in court.

Exam. Carter: The Commission will assume your motives were of the highest.

Mr. Blanchard: Thank you very much.

Exam. Carter: Have you any objection to this petition [fol. 6] of intervention?

Mr. Smith: If the Examiner please, we do not object to it, if it does not broaden the issues. I have not had an opportunity to scrutinize it closely.

Exam. Carter: Insofar as the petition of intervention does not broaden the issues, it will be permitted.

(The intervening petition was thereupon filed.)

Exam. Carter: Are there any other petitions of intervention?

(No response.)

Exam. Carter: Who appears for defendants?

Mr. Smith: Kenneth F. Burgess, Robert Thomas, and Douglas F. Smith, 11 South LaSalle Street, Chicago, Illinois, appearing for certain of the defendants. I wish to name those defendants for whom we appear. There are a number of them who are in the process of reorganization under Section 77 of the Act, or in Receivership; I shall simply give the name of the debtor in those instances, rather than the name of the Trustee. The Chicago, Milwaukee, St. Paul and Pacific Railroad. The Chicago and North Western Railway. The Chicago, Rock Island & Pacific Railway. The Minneapolis, St. Paul & Sault Ste. Marie Railway. The Chicago, Burlington & Quincy Railroad. The Atchison, Topeka & Santa Fe Railway. The Illinois Central Railroad. The New York Central Railroad. The Nickel Plate Railroad. The Pennsylvania Railroad. The Pere [fol. 7] Marquette Railroad. The Chesapeake & Ohio Railroad. The Chicago & Alton Railroad.

Mr. Blanchard: What was that last one?

Mr. Smith: The Chicago & Alton Railroad.

Mr. Blanchard: All right.

Mr. Smith: The Baltimore & Ohio Railroad. The Wabash Railway. I think, in writing you the other day, Mr. Rynder, I mistakenly failed to refer to the Wabash Railway, and I now name the Wabash as one of the defendants that we represent.

Exam. Carter: Are there any other appearances for defendants?

(No response.)

Exam. Carter: Mr. Rynder will get the free copy of the record for complainants?

Mr. Rynder: Yes.

Exam. Carter: And Mr. Smith will get the free copy of the record for defendants.

Mr. Smith: Yes. May I say that my reference to the New York Central is to the New York Central System Lines.

Exam. Carter: The complaint alleges that on direct shipments of live stock to complainant at Union Stock Yards, Chicago, Illinois, it, in order to effect delivery of such shipments to itself and its employes, is required to pay and has paid under protest a so-called yardage charge on each shipment, said charge being published by the Union Stock [fol. 8] Yard and Transit Company in a tariff filed with the Secretary of Agriculture; that this so-called yardage charge purports to be for services rendered after transportation by defendants under their line-haul rates has been completed; that the right of egress from the unloading pens to the nearest public streets has been, and is denied; that defendants' actions constitute an unreasonable rule, regulation or practice; that by reason of the facts stated, complainant has been and is subjected to the payment of rates and charges, and to the application of rules, regulations, and practices which have been for the two years preceding the filing of the complaint and which are and will be unreasonable, in violation of Section 1. The Commission is asked to require the defendants to cease and desist from the continuance of said unlawful practices and from the collection of said yardage charge, and award reparation to complainants during the statutory period. That is a rough statement of the issues, gentlemen. Does that substantially state the issues correctly?

Mr. Rynder: Mr. Examiner, I have been listening and I do not know of anything stated that is incorrect; but, of course, it does not fully state all of the allegations of the complaint.

Exam. Carter: No. That is true.

Mr. Rynder: I shall desire to be able to offer evidence under all of the allegations of the complaint.

[fol. 9] Exam. Carter: Very well. You may proceed.

Mr. Rynder: I will call Mr. Kidwell.

Exam. Carter: Be sworn, please, Mr. Kidwell.

E. W. KIDWELL, was sworn and testified as follows:

Direct examination.

By Mr. Rynder:

Q. Please state your full name, Mr. Kidwell.
A. E. W. Kidwell.
Q. What is your business, or profession?
A. Engineer.

Exam. Carter: Mr. Kidwell, in speaking, will you address the reporter, so that he can hear you.
The Witness: Yes.

By Mr. Rynder:

Q. With what company are you connected?
A. The Union Stock Yard and Transit Company.
Q. The corporate title of that company is the Union Stock Yard and Transit Company of Chicago?
A. Yes, sir.
Q. Is that the company that operates the principal stock yards in Chicago?
A. It is.
Q. At approximately what location?
A. It is at 41st and Halsted Streets.
Q. Mr. Kidwell, do you recall that some weeks ago I asked you and Mr. Henkle to furnish me a map that would show [fol. 10] the outlines of the stock yards property and the principal locations within it?
A. Yes, sir.
Q. Mr. Rynder, I would like to have marked for identification, the map which I now present to the Examiner, as Complainants' Exhibit 1.

Exam. Carter: It may be so identified.

(Complainants' Exhibit No. 1 marked for identification.)

By Mr. Rynder:

Q. I call your attention to the map which has been marked for identification as Complainants' Exhibit No. 1, Mr. Kidwell.
A. Yes.

Q. I will ask you for the moment to disregard the several white lines with the legend on them. I assume that that is the map you gave me at the time of the meeting with yourself and Mr. Henkle.

A. Yes, sir, it is.

Q. Was that map of the stock yards property prepared by you or under your immediate supervision?

A. I did that myself.

Q. You prepared the map yourself?

A. Yes, sir.

Q. Is it a true and correct representation of the stock yards property?

A. Yes, sir.

[fol. 11] Q. Did you, in connection with that request of mine, have made for me certain blue print copies of your original map?

A. Yes, sir.

Q. Are they true and correct blue print copies of the original map?

A. They are.

Q. That you gave me?

A. Yes, sir.

Q. Mr. Kidwell, perhaps you can answer one or two questions right now. You will observe that on this map, since you gave it to me, there have been placed certain white lines which bear a name or a legend.

A. Yes.

Q. I call your attention first to the white line bearing the name "Racine Avenue".

A. Yes.

Q. Does that correctly represent the location of Racine Avenue?

A. Yes, it does.

Q. On the east side of the map, I call your attention to a white line bearing the legend "Halsted Street".

A. Yes.

Q. Does that correctly represent the location of Halsted Street?

A. Yes, sir.

[fol. 12] Q. Now, I call your attention to the white line running east and west on the map bearing the legend "Exchange Avenue".

A. Yes, sir.

Q. Does that correctly represent the location of Exchange Avenue?

A. It does.

Q. Running north from Exchange Avenue is a white line bearing the legend "Laurel Street".

A. Yes.

Q. Does that correctly represent the location of Laurel Street?

A. It does.

Q. At the top of the map there is a white line bearing the legend "Transit Avenue".

A. Yes.

Q. Does that correctly represent the location of Transit Avenue?

A. It does.

Q. Immediately south of Transit Avenue is a white piece of paper bearing the legend "C. J. Switch Yards".

A. Yes.

Q. Does that correctly represent the approximate location of the switch yards of the Chicago Junction Railway?

A. It does.

Q. Now, then, at what appears to be the unloading areas [fol. 13] of the Chicago Union Stock Yards, there are white pieces of paper, one bearing the legend "Burlington Division Hog House", another, the legend "Rock Island Division Hog House", another, "Cuba Division Hog House", and another, bearing the legend "Northwest Division Hog House".

A. Yes.

Q. Are those names by which those locations are colloquially known?

A. Yes.

Q. In the stock yards area?

A. Yes.

Q. Are they likewise at approximately the correct points?

A. Yes.

Mr. Smith: I do not understand that this area represented by the white pieces of paper is co-terminus with the extent of the hog house.

The Witness: No. That covers the whole house.

Mr. Rynder: I might ask Mr. Kidwell—perhaps I should say first, that these were put on merely for convenience,

because I understand that is the name by which they are called.

The Witness: That is the common name.

By Mr. Rynder:

Q. Could you indicate on the map, Mr. Kidwell, the extent of the unloading area covered by these names that I have just called to your attention, beginning first with the Burlington Division hog house.

[fol. 14] A. That is the entire house.

Q. Running westerly from Laurel Street?

A. Running westerly from Laurel Street to the end of the house.

Q. To the end of the house?

A. About 1,700 feet.

Q. And the next one to the south is the Northwest Division hog house; what area is covered by that?

A. That runs from Laurel Street west to the end of the platform, 1,200 feet or 1,300 feet.

Q. And the one marked "Rock Island Division Hog House"?

A. That is the Northeast house, running east from Laurel Street.

Q. To the end of the loading facilities?

A. To Halsted Street, yes.

Q. And the one labeled "Cuba Division Hog House"?

A. That runs east from Laurel Street to the end of the platform.

Q. Mr. Kidwell, there have also been put on some further white lines. I call to your attention one of them labeled "Platform No. 8—Delivery".

A. Yes, sir.

Q. Is that the correct definition of that particular unloading facility?

A. Yes, it is.

[fol. 15] Q. I next call your attention to the one marked "Platform No. 6—Delivery Alley".

A. Yes.

Q. Does that correctly represent the location of Platform No. 6—delivery alley?

A. Yes, sir.

Q. I next call your attention to the white line marked "Platform No. 5—Delivery Alley".

A. Yes.

Q. Does that correctly indicate the location of that particular alley?

A. Yes, sir.

Q. I next call your attention to the white line bearing the legend "Platform No. 3—Delivery Alley".

A. Yes.

Q. Does that correctly indicate the location of that delivery alley?

A. Yes, sir.

Q. The next white line is marked "Platform No. 1—Delivery Alley".

A. That is correct.

Q. Does that correctly mark the location of said delivery alley?

A. Yes, sir.

Q. The next one is the platform No. 2—delivery alley.

[fol. 16] A. That is right.

Q. Does that correctly indicate the location of said delivery alley?

A. Yes, sir, it does.

Q. On this map, Mr. Kidwell, could you indicate to me where the property lines of the—or rather, indicate the lines that mark the boundary of the property of the Union Stock Yard and Transit Company of Chicago?

A. The property line extends from Halsted Street to Racine Avenue, east and west.

Q. Halsted Street to Racine Avenue?

A. Yes.

Q. Up north as far as Exchange Avenue?

A. Well, from 47th Street north to 39th Street.

Q. Does Racine Avenue run through?

A. North of Exchange Avenue the property follows the railroad tracks, along the west border.

Q. North of Exchange Avenue appear on the map a group of railroad tracks. Whose railroad tracks are those?

A. The Chicago Junction's.

Q. Is the property line of the Union Stock Yard and Transit Company in that area just east of the property line of the Chicago Junction?

A. Yes, sir.

Q. Is it marked in any way on this map?

[fol. 17] A. Yes. The property line between the Junction a right of way and the Union Stock Yard and Transit Company is marked with a dash-dot line.

Q. A dash-dot line?

A. Yes, sir.

Q. Then, continuing up on the westerly side of the yards into the area of the unloading pens, where is the boundary of the property, or the property line of the Union Stock Yard and Transit Company?

A. Well, the property extends as far west as Packers Avenue at the west end of the hog house.

Q. As far west as Packers Avenue?

A. Well, it is within 150 feet of Packers Avenue. It is the west end of the northwest hog house.

Q. That would be westerly of the——

A. Burlington Division.

Q. That would be westerly of the Burlington Division hog house?

A. Yes.

Q. As indicated on exhibit 1, being so identified?

A. Yes, sir.

Q. Then, northwardly, the property of the Union Stock Yard and Transit Company, you say extends to 39th Street?

A. To Pershing Road, yes.

Q. 39th Street, or Pershing Road?

A. Yes.

[fol. 18] Q. That is a more northerly point than any shown on this map?

A. Yes, it is.

Q. Then, does it extend across Pershing Road eastwardly?

A. To Halsted Street?

Q. To Halsted Street?

A. Yes, sir.

Mr. Rynder: I believe that is all I have from this witness. You may cross-examine.

Exam. Carter: Are there any questions, Mr. Smith?

Mr. Smith: Yes.

Cross-examination.

By Mr. Smith:

Q. When did you prepare that map, Mr. Kidwell?

A. This map has been made since the stock yards fire in different sections at different times since 1934. This map itself was made about a month ago, as the composite map here.

Q. Well, in the so-called Hygrade case, Docket 24375, Mr. Towner produced a map which he said he had prepared for the purpose of that case. It was later offered in that case by the complainants. Did you prepare that map?

A. I do not believe so, at that time.

Q. You do not know then, whether this is the same map or not?

A. No. This map is entirely new since 1934.

Q. Where is the sheep house located on this map?

A. The sheep house is at the western end of Exchange Avenue just east of the Junction tracks. It is that light [fol. 19] portion there (indicating).

Q. Can you outline the boundaries of that, please?

A. Well, the southern boundary line is about 150 feet south of Exchange Avenue. Then, the western line is the Chicago Junction tracks. The northerly line is—well, say it is about 200 feet west of Laurel Street. The west end is just south of No. 9 platform.

Q. The east line is where?

A. The east line along the tracks there—that is about 200 feet west of Laurel Street. Then, at Exchange Avenue there, that No. 3 house is about 150 feet wide at Exchange Avenue, that portion in light color there.

Q. Where are unloading platforms 9 and 10?

A. They are immediately south of the—that is, No. 9 is immediately south of No. 7 there on the opposite side of the track; and No. 10 is opposite No. 8 platform. They are not marked on the map there.

Q. That is, there is no showing on this white legend covering those?

A. No.

Q. What is the scale of this map?

A. 100 feet to the inch.

Q. You referred to the boundary lines of the stock yards company. This map does not incorporate all of the area — Union Stock Yard and Transit Company, as I understand it?

[fol. 20] A. Not all of it, no, sir.

Q. But it does show the west boundary line, does it?

A. Yes, along Racine Avenue.

Q. How is that boundary line marked, if at all?

A. What do you mean?

Q. I do not mean on the map; I mean on the ground.

A. There is no boundary line on the ground there, but-

side of a sidewalk along part of the line. Some of the buildings are on the line, on the west side of Racine Avenue.

Q. Where is the Swift plant located with respect to Racine Avenue, as shown on this map?

A. Immediately west of Racine Avenue, and south of Exchange.

Q. Are the Swift plants located between Racine Avenue and Ashland?

A. Yes, sir.

Q. Where is Ashland Avenue?

A. Ashland Avenue is a half mile west of Racine.

Q. Running parallel to it?

A. Parallel to Racine, yes, sir.

Q. Now, does this map show the south boundary line of the yard company?

A. Yes, it does, 47th Street.

Q. Is there any mark on the ground showing that boundary line?

A. Well, the center line of 47th street is the south line of the property, outside of the public streets.

[fol. 21] Q. And the west side of Halsted Street is the east boundary?

A. Yes, sir.

Q. How is that line marked, if at all, on the ground?

A. There is a fence along the west side of Racine Avenue—I mean Halsted Street.

Q. You mean Halsted Street?

A. Yes, sir.

Q. Is there a gate there?

A. Yes.

Q. Is that gate locked at night?

A. It is.

Q. Is the yard enclosed at night in any way?

A. Yes, sir. The gates are closed.

Q. By what means—where are those gates?

A. Along Halsted Street there is a gate at Exchange Avenue, 43rd and 45th Streets.

Q. Is there one at 47th Street?

A. There is one at 47th and Racine.

Q. Where are the other gates?

A. Well, there is one gate at Laurel Street and Pershing Road. The other gates that are outside of the yards, are operated by others than packers, I believe.

Q. That is, the west gate——
A. We have a gate at Exchange and Racine.
Q. Yes.
[fol. 22] A. That is called our west gate.
Q. That is called the Yards' west gate?
A. Yes, sir.
Q. Where else on Racine?
A. 47th.
Q. What time are those gates locked at night?
A. 7:00 o'clock, I believe.
Q. What time are they unlocked in the morning?
A. I do not know.
Q. What are the gates on the south side?
A. The only gate is at 47th and Racine.
Q. Now, those gates are in what kind of wall, or fence?
A. The Halsted Street gates are brick gates. The fences on the west side of the street——
Q. I am asking you about the character of the fence, or wall in which these gates are hung.
A. Oh, I see.
Q. What kind of wall encloses the stock yards property, or fence?
A. There is a wooden fence all the way around the stock yards property.
Q. I see. Now, these so-called streets that are shown on this map, insofar as they lie inside of this wall you have referred to, are private passageways, are they not?
A. Yes, sir.
[fol. 23] Q. And there are no public streets within the yards itself?
A. No, sir.
Q. The yards company owns no property west of Racine Avenue?
A. There are one or two parcels, small parcels north of Exchange Avenue that are west of Racine. They are not shown on the map.
Q. Now, you spoke about a gate on Ashland Avenue.
A. Yes.
Q. What kind of a wall runs along Ashland Avenue?
A. Along Ashland Avenue, most of it is brick buildings.
Q. Brick buildings?
A. Yes.

Q. These gates are across passageways between the buildings?

A. Yes, sir.

Q. Now, sometimes reference is made to the mile square that the stock yards operates. Does it operate or own a mile square?

A. The stock yards company does not.

Q. It does not?

A. No, sir.

Q. That mile square, so-called, also embraces some property west of Racine Avenue, does it not?

A. Yes, sir.

Q. That is sometimes referred to as Packing Town?

A. That is west of Racine Avenue.

Q. That area extends out to Halsted—or, to Ashland Avenue?

[fol. 24] A. Yes, sir.

Q. Is the entire so-called mile square then, enclosed in walls or by buildings, or with fences?

A. As far as I know, the whole mile square is enclosed.

Q. And the whole mile square is closed up at night through the use of gates?

A. Yes.

Q. In various passageways?

A. Yes.

Q. Is that not so?

A. Yes, sir.

Q. And locked?

A. I believe they are locked at night, all of them.

Q. You referred to a legend on the map that is between Transit Avenue and platform No. 1 as the J. C. switch yards, I think.

A. That is the North Division tracks. They call that the North Division tracks.

Q. Do you know how many tracks are in that switch yard?

A. What do you mean?

Q. I mean, how many tracks would be encountered in going from platform No. 1 over to Transit Avenue, for example?

A. I think there are about 12 tracks in there.

Q. Are there any other tracks north of Transit Avenue?

A. No, sir.

Q. Now, this Transit Avenue is within the stock yards property,

[fol. 25] A. Yes, sir.

Q. How far north of Transit Avenue, does 39th Street, or Pershing Road lie?

A. About 150 feet north.

Q. Did you say there were or were not tracks between so-called Transit Avenue and 39th Street?

A. No tracks.

Q. Where is the gate into the stock yards property, in the approximate vicinity of this point?

A. (No answer.)

Q. Is it at the junction of Laurel Street?

A. It is at the intersection of Laurel and Pershing Road, the south side of Pershing Road.

Q. Pershing Road was formerly 39th Street?

A. Yes, sir.

Mr. Smith: I think that is all.

Exam. Carter: Is there any further cross-examination?

Mr. Smith: Let me ask him this:

By Mr. Smith:

Q. Are you going to be here, Mr. Kidwell, in the event we should want to interrogate you further?

A. I cannot.

Mr. Smith: Well, I do not like to ask Mr. Kidwell to stay, because I do not know whether there will be any further questions. Can we have an understanding that he will return if we should want to ask him any further questions?

[fol. 26] Mr. Rynder: Mr. Smith, I requested Mr. Kidwell to come here and identify this map because he had made it, and he very courteously did so.

Mr. Smith: Yes.

Mr. Rynder: Now, I have no objection to your making any arrangement with Mr. Kidwell you desire, but I would feel rather embarrassed to have to ask him to stay as my witness.

Mr. Smith: I would not want to embarrass you, Mr. Rynder.

By Mr. Smith:

Q. Mr. Kidwell, will you be available to come back in the event we have some further questions we want to ask?

A. Yes, I think so.

Mr. Smith: That is all.

Mr. Blanchard: I would like to ask Mr. Kidwell a question.

Mr. Rynder: Just a moment. I have one or two questions on redirect.

Exam. Carter: Go ahead, Mr. Rynder.

Mr. Rynder: Mr. Smith, I did not exactly catch the location of the Junction tracks that you mentioned, and that you asked the witness about.

Redirect examination.

By Mr. Rynder:

Q. I desire to call your attention to the Junction switching tracks west of Laurel Street, which, I believe in answer [fol. 27] to a question from Mr. Smith you said would have to be encountered in getting out there.

A. Yes.

Q. The fact is that the small packers northeast of the yards, do run their trucks over that group of tracks.

A. Yes.

Q. In taking their live stock from the holding pens to their plants.

A. Yes.

Q. Is that not so?

A. Yes, sir.

Q. There is a roadway across the tracks which they can use for that purpose?

A. It is a plank crossing.

Q. What they have to do is to pay close attention to see they are not getting in the way of some train?

A. Yes.

Q. I believe you said that all tracks within the boundary of the stock yards—I mean, all streets—strike that, please. I believe you said, Mr. Kidwell, that all streets within the boundaries of the property of the Union Stock Yard and Transit Company were private streets. Of course, that related only to the property line as shown on the map, or north thereof to 39th Street?

A. Yes. They are all private streets.

[fol. 28] Q. Not referring to such streets as 42nd Street coming in from the east, from Ashland, and so forth?

A. No.

Mr. Rynder: That is all I have.

Mr. Blanchard: I have one question of Mr. Kidwell.

Exam. Carter: Suppose you let Mr. Smith finish his re-cross-examination.

Mr. Blanchard: I thought he was through.

Exam. Carter: He had finished his cross-examination, but I think he has some recross-examination.

Mr. Smith: Yes.

Recross-examination.

By Mr. Smith:

Q. Going back to these streets again which you and I discussed, and which you and Mr. Rynder just mentioned, in the first place, every street that is shown on this map except Halsted Street is a private street, is it not?

A. Halsted Street, 47th Street and Pershing Road are public.

Q. And 47th Street?

A. They are public streets, yes.

Q. Now, there are some streets running from Halsted Avenue—strike that. I mean, there are some streets running from Ashland Avenue into Racine Avenue into so-called Packing Town?

A. Yes, sir.

Q. As I understood you, you said your understanding was that those were private streets. Did I correctly understand you?

[fol. 29] A. To my knowledge they are private streets.

Q. Who are the small packers you referred to a few moments ago?

A. Illinois Meat is one. There are several others. I cannot think of the names of those.

Q. Well, in answer to the question of Mr. Rynder, your reference to small packers, related to the Illinois Meat Company, and some others whose names you cannot recall?

A. Yes.

Q. Is that correct?

A. Yes, sir.

Q. What are these unloading chutes down near the southwest corner of the map, seemingly running parallel to Racine Avenue?

A. Those are what we call our Texas chutes.

Q. What?

A. The Texas chutes, in the extreme southwest corner of the yards.

Q. What are they used for, please?

A. They formerly were used for loading out, mostly.

Q. What are they now used for, if anything?

A. I do not know what they are used for now.

Q. What is there in these blank spaces that are shown here on the map, if anything? I refer to such blank spaces as those appearing on the map opposite A-24 and A-23.

A. That area has been burned out and has not been rebuilt since.

[fol. 30] Q. What packing company plants, if any, or packing facilities are located within the area marked by so-called Transit Avenue on the north, 47th Street on the south, Halsted Street on the east, and Racine Avenue on the west?

A. The only one inside of those boundaries is the Hammond Packing Company.

Q. Where is that located?

A. That is directly north of 47th Street.

Q. Can you locate it more explicitly, with reference to some of the information shown on here?

A. It lies south of the tracks of block D-24, and north of 47th Street, and immediately east of Racine Avenue?

Q. Is that space as it appears on the map between the tracks that are shown north of the area covered by the Hammond plant—does that contain any additional tracks that are not shown?

A. There are some tracks immediately north of 47th Street and south of the Hammond plant.

Q. That are not shown here?

A. No, sir, that are not shown there.

Q. What other tracks exist on the ground that are not *the* depicted on this map?

A. That is about all of the tracks that would be on this map, covering the area that is shown. It would be that section south of Hammond.

Q. Does the group of tracks which terminates about in the [fol. 31] center of the space between—strike that, please. Does the map correctly show these switch tracks in the southeast corner of the map terminating at the point they do?

A. As far as I know, those tracks do stop there.

Q. Where are those other tracks you just referred to in that area?

A. Immediately south of Hammond's, and north of 47th Street.

Q. How many of them are there?

A. Probably a dozen tracks.

Q. Then, Armour has a building located within the area I referred to, does it not, shown on the map as Armour & Company, general offices?

A. Yes, the Armour general office and gymnasium building.

Mr. Smith: I have finished again, for the time being.

Exam. Carter: Have you anything further, Mr. Rynder?

Mr. Rynder: Just one more question.

By Mr. Rynder:

Q. You have outlined generally the property lines of the Union Stock Yard and Transit Company as being Racine Avenue on the west, Halsted Street on the east, 47th Street on the south, and Pershing Avenue to the north. Is that subject to this reservation, that where tracks of the Chicago Junction are shown, the Chicago Junction owns its own right of way?

A. No. They operate the tracks. They lease that property.

Q. They lease the property?

A. Yes.

[fol. 32] Q. The Chicago Junction, however, is leased to a subsidiary of the New York Central?

A. Yes.

Q. They lease both tracks and right of way?

A. Yes.

By Mr. Smith:

Q. From the Union Stock Yard and Transit Company?

A. Yes.

Exam. Carter: Have you anything further, Mr. Smith?

Mr. Smith: That is all.

Exam. Carter: Mr. Rynder?

Mr. Rynder: Mr. Examiner, I desire to offer in evidence the map marked for identification as Complainants' Exhibit No. 1.

Exam. Carter: Is there any objection?

Mr. Smith: No objection.

Exam. Carter: It will be received in evidence as Complainants' Exhibit No. 1.

(Complainants' Exhibit No. 1, witness Kidwell, received in evidence.)

Exam. Carter: Are there any further questions of Mr. Kidwell?

(No response.)

Exam. Carter: That is all, Mr. Kidwell. You may be excused.

(Witness excused.)

[fol. 33] Exam. Carter: You may call your next witness, Mr. Rynder.

Mr. Rynder: Mr. Examiner, in order that I might offer in evidence certain correspondence here, I served upon counsel for each of the defendants, notice in the usual form to produce certain original letters, stating that upon failure to do so, we should offer secondary evidence of the contents thereof. I have received acknowledgments of that notice from all of the counsel to whom it was sent except those for the Grand Trunk Railway System, and the Chesapeake & Ohio Railway Company. I sent tracer letters myself because of the failure to receive those acknowledgments. I think it would be carrying things to the point of absurdity if I should have to send a notice now to produce a copy of the letter I sent asking that my original notice be acknowledged. It has been impossible for me to do it. While it is unusual for counsel to take the stand, since I wrote the letter I could, if necessary, take the stand and testify that I wrote both the notices that were sent to those two companies, and the letters tracing for acknowledgment of the notices. I would like to know if counsel for the defendants have any information as to those two lines?

Mr. Smith: That was the Grank Trunk and what other, please?

Mr. Rynder: The Grand Trunk and Chesapeake & Ohio.

[fol. 34] Mr. Smith: I do not know anything about the Grand Trunk situation. As to the Chesapeake & Ohio—is that the other one?

Mr. Rynder: Yes.

Mr. Smith: I am advised that those letters that you referred to as having been sent, were received.

Mr. Rynder: Under those conditions, and since I have received no reply from the Grand Trunk, either to my notice of which I hand you a copy——

Mr. Smith: I wonder if we could discuss this off the record for a moment? We might save some money on this transcript.

Mr. Rynder: I thought I had the right to proceed to introduce these letters, regardless of the fact——

Mr. Smith: I was going to try to make it easier for you.

Mr. Rynder: All right.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will recess for five minutes.

(A short recess was taken.)

Exam. Carter: Come to order, gentlemen.

Mr. Rynder: Mr. Examiner, I hand you two copies of a certain document, which I would like to have marked exhibit 2 for identification.

[fol. 35] Exam. Carter: It may be so identified.

(Complainants' Exhibit No. 2 marked for identification.)

Mr. Rynder: How many of these will you want, Mr. Smith?

Mr. Smith: Five.

Mr. Rynder: May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Proceed, Mr. Rynder.

Mr. Rynder: I will call Mr. W. A. Mayfield.

Exam. Carter: Be sworn, Mr. Mayfield.

W. A. MAYFIELD, was sworn and testified as follows:

Direct examination.

By Mr. Rynder:

Q. State your full name for the record, please, Mr. Mayfield.

A. W. A. Mayfield.

Mr. Rynder: I am offering Mr. Mayfield to make proof of certain letters, sent from his department in case the carriers, in response to my notice to produce, have not produced the originals of the letters, sent from Mr. Mayfield's department. May I inquire whether those original letters are here?

Mr. Smith: Whether they are here?

Mr. Rynder: Yes.

Mr. Smith: No, they are not.

Mr. Rynder: Then, I will proceed as indicated in that [fol. 36] notice, Mr. Examiner, to offer secondary proof.

Exam. Carter: You may proceed.

By Mr. Rynder:

Q. Give your residence, Mr. Mayfield.

A. Chicago, Illinois.

Q. Your position.

A. Manager of the transportation department of Swift and Company.

Q. Mr. Mayfield, I call your attention to a certain file which you gave me from your department containing certain letters which were sent by you or by your predecessor, Mr. O'Hara to certain railroad companies which have been copied into the document which has been marked for identification as Complainant's Exhibit No. 2.

A. Yes.

Q. It appears that the first group of letters were sent on May 9, 1933.

A. Yes.

Q. Do you recall my showing you the document marked Complainants' Exhibit No. 2 for identification, purporting to be copies from the file you have before you of said letters?

A. Yes, sir.

Q. Did you examine this to see if it is a true and correct copy of those letters?

A. I did.

Q. Now, as to that group of letters, they bear, down in [fol. 37] the right hand corner—or rather, in the left hand corner, the initials "ROH".

A. And "R. O'Hara".

Q. Under the signature "Swift & Company" there appears "R. O'Hara"?

A. Yes.

Q. Please state who Mr. O'Hara was.

A. Mr. O'Hara at the time these letters were written was Manager of the Transportation Department of Swift & Company.

Q. Was he your predecessor in that position?

A. Yes.

Q. Did you take part in the drafting and compilation of those letters?

A. I did.

Q. Have you the carbon copies of all those letters in the original file that you now have before you?

A. Yes, sir.

Q. Did you personally see that those letters dated May 9th, 1933, were mailed?

A. Yes, sir.

Q. You read them before they were mailed?

A. Yes, sir.

Q. Now, I next turn to the group of letters commencing at page 149 of said Complainant's Exhibit No. 2 for identification—strike that, please. I next call your attention to [fol. 38] a letter dated May 16, 1933, addressed to F. B. Houghton, Vice-President of the Atchison, Topeka & Santa Fe Railway, Chicago, Illinois, appearing at page 151 of exhibit No. 2.

A. Yes.

Q. If I should ask you all of the questions I have about the first group of letters, would it be true also of this letter of May 15th to which I have called your attention?

A. Yes, sir.

Q. Is your original carbon copy of that letter in the file you have before you?

A. Yes, sir.

Q. Is the letter you have in exhibit No. 2 a true and correct copy of that original?

A. Yes, sir.

Q. Now, would that same statement be true of the other letters bearing date of May 16th, addressed by you to the various railroad officials as indicated by copies in exhibit 2 for identification?

A. Yes, sir.

Q. Now, the next group of letters are from railroad executives, of which the letter dated May 23, 1933, at page 111-A of said exhibit is illustrative, and the remainder of the

letters continued on succeeding pages—most of them being dated May 19, 1933, and signed by certain railroad executives as indicated in the copy. Are the original letters of [fol. 39] which those letters of May 19th, and May 23, 1933, are copies, in your file which you have before you?

A. Yes, they are.

Q. Have you examined them recently?

A. Yes, sir.

Q. Are you acquainted with the signatures on the original letters?

A. Yes.

Q. Are the copies in Complainants' Exhibit No. 2 for identification, true and correct copies?

A. Yes, sir.

Q. I next call your attention to a letter dated May 9, 1933, addressed to the Union Stock Yard and Transit Company, Chicago, Illinois, bearing you- file number A-26953.

A. Yes.

Q. Is the original copy of such letter in the file that you have before you?

A. Yes, sir, it is.

Q. Is it a true and correct copy of the letter appearing in the exhibit?

A. Yes, sir.

Mr. Rynder: Incidentally, I understood, Mr. Smith, that you had agreed to excuse Mr. Leonard from being called to produce the originals of these particular letters I am referring to now.

[fol. 40] Mr. Smith: As I recall it, at your suggestion, I spoke to Mr. Ralph Shaw, counsel for the yards, about those letters, and he gave me his assurance that copies of the letters had been received. I told him I would raise no question about the authenticity of the copies, or as to whether or not they have been received.

Mr. Rynder: Very well.

By Mr. Rynder:

Q. I next call your attention to a letter from the Union Stock Yard and Transit Company dated May 10, 1933, signed by Arthur G. Leonard, President, appearing at page 107 of exhibit 2 for identification.

A. Yes.

Q. Is the original of that letter in the file you have before you?

A. Yes, sir.

Q. Are you acquainted with Mr. Leonard's signature?

A. Yes, sir.

Q. Is the copy shown in Complainants' Exhibit No. 2 for identification a true and correct copy of the letter?

A. Yes, sir.

Q. I next call your attention to a letter dated May 24th, 1933, addressed to Mr. Arthur G. Leonard, President, Union Stock Yard and Transit Company, appearing at page 106 of Complainants' Exhibit No. 2.

A. Yes.

[fol. 41] Q. I ask you if the original copy of that letter is in any part of the file you have now before you?

A. It is.

Q. Is the copy of the letter on page 106 a true and correct copy?

A. Yes, sir.

Q. I now call your attention to the letter from the Union Stock Yard and Transit Company, dated May 24th, 1933, appearing at page 105 of exhibit No. 2.

A. Yes.

Q. I will ask you if you have the original of that letter, signed by Mr. Leonard, in the file before you?

A. Yes.

Q. Are you acquainted with Mr. Leonard's signature?

A. Yes, sir.

Q. Is the letter appearing at page 105 a true and correct copy of that letter?

A. Yes, sir.

Q. I now call your attention, Mr. Mayfield, to a group of letters all dated May 31, 1933, addressed to various railroad executives, and extending from page 85 to 105 of Complainant's Exhibit No. 2 for identification.

A. 104.

Q. Yes; page 104 of exhibit 2.

A. Yes.

[fol. 42] Q. Have you the carbon copies of those letters in the file before you?

A. Yes, sir.

Q. Are the copies shown in exhibit 2, true and correct copies of the carbon copies that are in your file?

A. They are.

Q. I now call your attention to a group of letters from various railroad executives commencing at page 46 of complainants' exhibit 2, purporting to be replies to your letter of May 31—strike out that question. I now call your attention to a group of letters from various railroad executives as set forth on pages 64 to 84, inclusive of exhibit 2, all of which appear to be replies of various railroad executives to your letter of May 1, 1933.

A. May 31st.

Q. What?

A. May 31st.

Q. May 31st, 1933.

A. Yes.

Q. I ask you if you have in the file before you the original carbon copies—please strike that. I ask you if you now have in the file before you the originals of the letters from railroad executives as indicated on said pages of Complainants' exhibit 2?

A. Yes, I have.

[fol. 43] Q. Are you acquainted with the signatures of the gentlemen who signed those letters?

A. Yes, sir.

Q. Are the copies of those letters as indicated in exhibit 2, true and correct copies of the original letters?

A. They are.

Q. In the file?

A. They are.

Q. I now call your attention to a group of letters, the first of which is dated June 16th, 1933, at page 63 of the exhibit; the second of which is at page 62 of said exhibit; the third of which is at page 60 of said exhibit; the fourth of which is at page 59 of said exhibit; the fifth of which is at page 57 of said exhibit; the sixth of which is at page 55 of the exhibit; the seventh of which is at page 52 of the exhibit——

Mr. Smith: Mr. Rynder, may I interrupt to make a request at this moment?

Mr. Rynder: Yes.

Mr. Smith: Mr. Examiner, I have subpoenaed Mr. Henkle to testify in this case. After the subpoenae was served on him, his counsel, Mr. Shaw, communicated with me, and said it was quite essential that Mr. Henkle go to Washington this afternoon, I think with Mr. Gladson, in connection with some matter, and asked me if the carriers would be willing

to call Mr. Henkle at such time that he could leave on the [fol. 44] afternoon train. Mr. Shaw also said that Mr. Rynder was to be in his office on Saturday morning, and that he would take the matter up with Mr. Rynder, and see whether Mr. Rynder had any objection. He later called me, and he said he had discussed the matter with Mr. Rynder, and Mr. Rynder was glad to give way to enable Mr. Henkle to get off on his train. I very much dislike to call Mr. Henkle to the stand, and insofar as the defendants' case is covered by his testimony, to offer it possibly in advance of testimony submitted by the complainants, in support of their case, but I thought under the circumstances, we should not refuse that request. I would like to hear as much of Mr. Rynder's real case as possible before Mr. Henkle takes the stand, because after Mr. Henkle is gone, he is gone. We will have to get along without him. Mr. Henkle's testimony here as in the Hygrade case will cover many things which I think should be covered by a stock yards official. The request I desire to make is that Mr. Rynder permit this very formal and relatively unimportant testimony to go at the present time, and proceed to put in his case, and then let the defendants call Mr. Henkle in the light of as much of a hearing of complainants' case as possible. Are you willing to do that, Mr. Rynder?

Mr. Rynder: Mr. Examiner, I am willing to do anything to accommodate Mr. Henkle, and I so stated to Mr. Shaw when he spoke to me last Saturday morning. Now, while [fol. 45] we may differ upon it, I think one important part of my case is in the letters I am just identifying.

Mr. Smith: There is not going to be any difficulty about that.

Mr. Rynder: If Mr. Smith desires to expedite matters by accepting in sum total the word of Mr. Mayfield that these letters are true and correct copies of what they purport to be, we could stop right now instead of taking them up one by one. The originals are in this file that belongs to Mr. Mayfield and his department, and he examined the copies to see that they were true and correct copies. That would expedite the matter that much.

Mr. Smith: I do not anticipate the slightest difficulty about these letters, but in any event, we are not making any time on those, because I have to ask for an opportunity to glance over these two rather bulky volumes during the

noon recess, and after having done that, I do not think there will be any difficulty about the matter at all.

Exam. Carter: Mr. Henkle, how long are you going to be away?

Mr. Henkle: I beg your pardon?

Exam. Carter: How long will you be away?

Mr. Rynder: I have simply this in mind: I am willing to do everything to accommodate Mr. Henkle, but Mr. Mayfield also has some engagements, and I want these letters [fol. 46] at least to be identified while he is on the stand. After that, I am at Mr. Smith's pleasure. I simply want to say this: when he says he wants me to put in the major part of my case before Mr. Henkle goes on the stand, I can well understand that that is proper, but if Mr. Henkle is going to make a certain afternoon train, I do not want him to be put on at so late a time I will not have a reasonable chance for cross-examination—and I mean, a reasonable chance.

Exam. Carter: How long do you anticipate it will take to present your case in chief?

Mr. Rynder: It is half past eleven; probably until the middle of the afternoon.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Rynder: I am unwilling to stop at this moment the identification of the letters about which I am interrogating Mr. Mayfield, unless counsel for the carriers is willing to stipulate that if I had asked Mr. Mayfield all such questions as I have asked him heretofore about the remaining letters in the exhibit, he would have testified that as to the letters mailed by Swift & Company, they were true and correct copies of the original carbon copies in his possession and that the replies from the various railroad companies are true and correct copies of the originals in his posses- [fol. 47] sion, and that he is acquainted with the signatures of the gentlemen who signed them.

Exam. Carter: I understand that Mr. Smith will not be willing to do that until he has had an opportunity at the noon recess, to examine them.

Mr. Smith: Mr. Rynder, if I may have an opportunity during the noon hour to check these letters against copies which I have received from the carriers. I will so stipulate,

unless we find that in some instances, different letters were sent and received, in which event I will call that to your attention at the earliest opportunity.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Rynder: With that understanding that Mr. Smith will make that stipulation I suggested, and unless he finds some error in the letters contained in Exhibit No. 2, I will now consider that subject to such later objection I have furnished the necessary evidence to identify the letters in Complainants' Exhibit No. 2, and I will not ask any more questions by way of identification from Mr. Mayfield at this time. Mr. Mayfield, I have one more question.

By Mr. Rynder:

Q. Mr. Mayfield, those letters which comprise the last group of letters, which are those appearing at the first pages of exhibit No. 2, are from certain railroad executives, and end [fol. 48] the correspondence. Did you and the parties with whom you were associated, that is, Armour and Swift, make some efforts after these letters were written to try to obtain compliance with the legal demands therein stated?

A. Yes, we did.

Q. Just to sum it up in a word, how were those meetings held, and what was the result?

Mr. Smith: That is objected to as immaterial. The best evidence of the attitude of the defendants in this case are the answers they have filed.

Mr. Rynder: I will waive that and merely say that the answers contained in this complaint were filed.

Exam. Carter: I did not understand you.

Mr. Smith: We are contesting this complaint that you have on file here, if that is the point you are trying to develop.

Mr. Rynder: Yes. In other words, the letter to which similar letters appear in the first part of the exhibit, stated the final position of the carriers, so far as this correspondence and negotiation was concerned.

Mr. Smith: I cannot generalize on the subject in that way. Our position in the case is stated in our answers, and will be more fully exp-ored before the record is disclosed.

Mr. Rynder: Very well.

Mr. Smith: We are unwilling to give you the relief you [fol. 49] are seeking here, if that is what you want to elicit from me.

Mr. Rynder: Let me ask you this, Mr. Mayfield:

By Mr. Rynder:

Q. Referring to the first letter in Complainants' Exhibit No. 2, of September 27th, 1935, did you ever receive any further, or different letter from the carriers which modified, changed or altered the position taken in the letters commencing at page 1 of Complainants' Exhibit 2, and continuing through page 38 of the exhibit?

A. No, we did not.

Q. When Mr. Smith commenced to speak a few minutes ago, I was calling your attention to a certain group of letters from railroad executives, commencing with July 25, 1933, on page 46 of Complainants' Exhibit No. 2, and continuing through, I think, page 63 of the exhibit, all of which generally are letters declining certain bills sent by Swift & Company, to those carriers?

A. Yes.

Q. Are the originals of that group of letters in the original file that you now have before you?

A. Yes, they are.

Q. Are you acquainted with the signatures of the gentlemen who signed them on behalf of the railroads?

A. Yes.

Q. Have you made an examination to see that the copies of those letters contained in Complainants' Exhibit No. 2 [fol. 50] are true and correct?

A. Yes, sir.

Q. Are they true and correct?

A. Yes, sir, they are.

Q. Is the same thing true of the group of letters commencing with page 1 of the exhibit—or rather, is the same thing true of the letter of September 9, 1935, in the exhibit?

A. It is.

Q. Have you the original carbon copy of that in your file now?

A. Yes.

Q. Is the copy in the exhibit a true and correct copy?

A. Yes, sir, it is.

Q. Now, I call your attention to the replies of that letter of September 9th, which commence at page 1, and continue, apparently through page 9.

A. Yes.

Q. Are the originals of those letters in the file which you now have before you?

A. They are, yes, sir.

Q. Are you acquainted with the signatures of the gentlemen who wrote them?

A. Yes, sir.

Q. And are the letters to which I have just referred, true and correct copies of the original letters which you have said were in your file?

[fol. 51] A. They are, yes, sir.

Mr. Rynder: You may cross-examine.

Mr. Smith: I have no questions, at this moment.

Mr. Rynder: At this time, I offer in evidence the document that has been marked for identification as Complainants' Exhibit No. 2.

Exam. Carter: That is, subject to the verification that has been previously discussed.

Mr. Smith: I would like to withhold any comment on it for the present.

Exam. Carter: My ruling will be deferred.

Mr. Rynder: I could not, of course, have any objection to counsel comparing these letters, to see that they are correct. If there is otherwise any objection to the acceptance of them, I would be glad to have it stated.

Mr. Smith: I will be glad to tell you what our position is now. We do not think these letters are material or competent. They are self-serving, I think on both sides. We are not going to object to them. However, I call to the Commission's attention the fact that we believe them to be immaterial, incompetent and self-serving. I am reserving, if I may, this opportunity to see what letters are really incorporated there, as I really have not had an opportunity to do so up to this time.

Exam. Carter: Very well.

[fol. 52] Mr. Rynder: That will be all, Mr. Mayfield.

Mr. Smith: That is all.

Exam. Carter: You are excused, Mr. Mayfield.

(Witness excused.)

Mr. Rynder: Mr. Examiner; I now offer as Complainants' Exhibit No. 3, a copy of what we understand to be the current schedule of charges of the Union Stock Yard and Transit Company of Chicago, bearing the heading "U. S. Y. & T. Co. No. 10", issued August 24, 1936, effective September 3, 1936, issued by O. T. Henkle, Vice-President and General Manager.

Exam. Carter: Who is that filed with?

Mr. Rynder: That has been certified by the Secretary of Agriculture to be a true and correct copy. I also hand to the Examiner, an uncertified copy.

Mr. Smith: It is a true and correct copy of the current tariff of the U. S. Yards filed with and received by the Secretary of Agriculture?

Mr. Rynder: That is as we understand it; this is the current tariff with all of the supplements, the presently effective supplements.

Mr. Smith: I just wondered if the certification shows what this really is.

Mr. Rynder: I am now offering that document, Mr. Examiner.

Exam. Carter: Is there any objection?

Mr. Smith: No objection.

[fol. 53] Exam. Carter: Complainants' Exhibit No. 3 will be received in evidence.

(Complainants' Exhibit No. 3 received in evidence.)

Mr. Rynder: I should like now to make this further reservation, that in order to accommodate Mr. Henkle, he ought to be on the stand at such time as will allow for a reasonable degree—not an extended degree—of cross-examination. Apparently he will not be able to be back during this hearing.

Exam. Carter: Off the record.

(Discussion outside of the record.)

Exam. Carter: Back on the record. You may proceed, Mr. Rynder.

Mr. Rynder: I will call Mr. Tally.

G. F. TALLY, was sworn and testified as follows:

Direct examination.

By Mr. Rynder:

Q. Please state your name and address.
A. G. F. Tally, Chicago, Illinois.
Q. What is your position?
A. Assistant to the traffic manager of Swift and Company.
Q. For how many years have you been employed in the traffic department of Swift and Company?
A. Approximately twenty years.
Q. Prior to your employment by Swift and Company, did you have any experience in the stock yards of The Union [fol. 54] Stock Yard and Transit Company of Chicago?
A. Yes, sir.
Q. For how long?
A. About one year.
Q. During that period did you become familiar with the manner in which live stock is handled in and about said stock yards?
A. Yes, sir.
Q. In the course of your employment in the Traffic Department of Swift and Company, have you continued to see and become familiar with the general methods of handling live stock in and about said stock yards?
A. Yes. Our general office building is located in what is commonly known as the stock yard area, and I pass in and through that area each day coming to and from the office, and frequently I have occasion to go to other points in the stock yard area and know the general methods of handling live stock at the present time.
Q. Is Swift and Company a corporation organized and existing under the laws of the state of Illinois, with principal office and place of business at Chicago, Illinois, as alleged in paragraph 1 of the complaint?
A. It is.
Q. Is Omaha Packing Company a corporation organized and existing under the laws of the state of Kentucky, with principal office and place of business at Chicago, Illinois, as [fol. 55] alleged in paragraph 1 of the complaint?
A. Yes, it is.

Q. Is G. H. Hammond Company a corporation organized and existing under the laws of the state of Michigan, with principal office and place of business at Chicago, Illinois, as alleged in paragraph 1 of the complaint?

A. It is.

Q. Does Swift and Company operate a packing plant adjacent to the property of The Union Stock Yard and Transit Company of Chicago?

A. Yes. Its location is shown on the map which has been offered as exhibit 1.

Q. I am not so sure it is shown on there, Mr. Tally. I might say, there will be another smaller map later offered to show our location. However, can you indicate on the map exhibit No. 1 the approximate location of Swift and Company's packing plants?

A. Swift and Company's packing plants are located just west of Racine Avenue, on the south side of Exchange Avenue. Some plants are located two or three blocks west of Racine Avenue, which are north of Exchange Avenue. They come within the area between Ashland Avenue and Racine Avenue.

Q. What is the location of the Omaha Packing Company?

A. It is located at 26th and Halsted Streets, Chicago.

Q. What is its interest in this proceeding?

[fol. 56] A. While live stock is generally shipped direct to the plant of the Omaha Packing Company, and not to the Union Stock Yards, there are occasions when cars of live stock, intended for the Omaha Packing Company, are delivered at the Union Stock Yards.

Q. Is the Omaha Packing Company a wholly owned subsidiary of Swift and Company?

A. Yes.

Q. What is the present status of the G. H. Hammond Company so far as the operation of a packing plant is concerned?

A. Formerly, and at the time of the filing of the complaint, the G. H. Hammond Company, a wholly owned subsidiary of Swift and Company, operated a packing plant in the southern portion of the stock yards district, in and around 45th Street and Racine Avenue. It is my understanding that recently the operation of that property as a packing plant has been discontinued, and the operations formerly conducted there are now conducted in the plants of Swift and Company.

Q. It is alleged in paragraph III of the complaint that during recent years complainants have shipped via the lines of the defendants, from points in the various states named in paragraph II, carloads of live stock consigned to complainants at Union Stock Yards, Chicago, Illinois. Do you know whether that is a fact?

A. Yes, our records so show.

[fol. 57] Q. It is further alleged that these shipments are commonly known as "direct shipments". Will you please define what is meant by a direct shipment?

A. By direct shipments are meant shipments as to which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries or employees, is shown as the consignor in the bill of lading, shipping receipt, waybill, or other transportation documents issued by defendants at the several points of origin, and in which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents or employes, is shown as the consignee of the shipments at Union Stock Yards, Chicago, Illinois. Such shipments consist of live stock which has been purchased by Swift and Company at points other than Chicago. For example, Swift and Company might purchase a carload of cattle, hogs, or sheep on some other public market, such as Kansas City, Omaha, St. Paul, or Denver, or make a similar purchase in the country where they maintain a number of buying stations. If intended for Swift and Company, such a shipment would be billed to Swift and Company, Union Stock Yards, Chicago, Illinois, as consignee. The term "direct shipment" has undoubtedly grown up to distinguish this class of shipments from shipments by live stock producers and others, consigned to commission men at Union Stock Yards, Chicago, where they are placed on sale by the commission men and there purchased generally [fol. 58] by a Chicago packer or by an order buyer for a packer at other points. This class of shipments is now well recognized on the market.

Q. By that you mean, direct shipments?

A. Yes.

Q. Go ahead.

A. The daily newspapers, bulletin boards in the yards, daily radio reports, and so forth, state generally the total receipts divided as between direct and those consigned to commission men for sale on the market?

Q. Just a minute, Mr. Tally.
A. Yes.

Mr. Rynder: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

By Mr. Rynder:

Q. I call your attention to the fact that the term "stockyard services", as stated in section 301 of the Packers and Stockyards Act, means "services or facilities furnished at a stock yard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock". Does Swift and Company desire or require any of these stock yard services in connection with direct shipments to it at the Union Stock [fol. 59] Yards, Chicago?

Mr. Smith: That is objected to as calling for a conclusion by the witness on one of the legal questions put in issue by the complaint here.

Mr. Rynder: Please do not rule on that yet, Mr. Examiner. I am going to ask him about each one of these. I am not asking for a conclusion. I am asking as a fact, if we use the marketing service on our directs. I am asking him as a fact if we use the feeding service on directs. I am asking him as a fact if we use the watering service on directs, and so forth. I have read the statutory definition. What I am asking him is not a conclusion of law, but a fact as to how our shipments are handled.

[fol. 60] Mr. Smith: I will not object to a statement by this witness of fact as to how these particular shipments that are involved here, are actually handled. I do object to the witness undertaking to put an interpretation on the words used in the Packers and Stock Yards Act.

Mr. Rynder: I am not asking the witness to do that.

Exam. Carter: I understood the question differently. Read the question please, Mr. Reporter.

(The question was read.)

Exam. Carter: I think that is a pretty broad question, in view of the issues in this case.

Mr. Rynder: Well, I can ask him singly.

Exam. Carter: Could you ask him what services Swift & Company require?

Mr. Rynder: I can ask him singly. It is not a legal conclusion. It is a fact. I can ask him as to what we desire or require in connection with livestock as to each one of those.

Exam. Carter: As to what you desire or require?

Mr. Rynder: Desire or require.

Exam. Carter: Very well. Proceed.

By Mr. Rynder:

Q. Mr. Tally, in connection with direct shipments of the nature you receive, does Swift & Company desire or require any stock yards services or facilities in connection with the receiving, buying or selling on a commission basis or otherwise, of livestock shipped to it as directs?

[fol. 61] Mr. Smith: That is simply asking the witness to state whether or not the services that are involved in this proceeding are transportation services or stock yards services.

Mr. Rynder: Not at all; I am simply asking him as a matter of fact.

Exam. Carter: Why can't you ask him what services Swift & Company desires or requires on these direct shipments today?

Mr. Rynder: Well, I would rather ask it the other way, if it is not objectionable, because I want to cover every item in here.

Mr. Smith: It is objectionable.

Mr. Rynder: I do not think it is objectionable. The first item here I have asked him about is this: "buying, or selling on a commission basis or otherwise". This witness knows as a matter of fact whether or not our shipments are brought in there to be bought or sold on a commission basis. He knows they are not. They are brought in there to go to our slaughter houses. I think I have a right to ask that question.

Exam. Carter: I will rule you have a right to ask that particular question. I will overrule Mr. Smith's objection to that question.

By Mr. Rynder:

Q. Mr. Tally, are any of your shipments that you have testified to as directs, brought into the Union Stock Yards

for any service in connection with buying or selling on a commission basis, or selling them otherwise?

[fol. 62] A. They are not.

Q. What is the fact as to those shipments?

A. Our shipments, designated as direct shipments, have been purchased by us in the country for the purpose of shipping them to Chicago to be slaughtered in our packing-house locations at Chicago. We are only desiring the receipt of our livestock at Chicago so that we may take them to the slaughtering plants, and thereby complete the slaughtering.

Q. You never desire—or rather, do you ever desire to have them sent to the commission men's pens for sale, under any circumstances?

A. I have never understood we require any such service as that. In fact, one of the reasons, according to my information, during my period in the yards, for over 21 years, that they show the difference between directs and the other receipts on the market, is to show what is in the yards and to show what amount of the total receipts is on the market for sale, the directs not being included as livestock for sale.

Q. Now, the next item in the list of things I quoted to you from the Packers and Stock Yards Act is the marketing of livestock. You have already answered that, I believe, but I want it here specifically: are any of those direct shipments brought to your company at the Union Stock Yards for the purpose of marketing those shipments?

A. No, sir. They are not to be marketed in any form, [fol. 63] except and until after slaughter.

Mr. Smith: I do not want to interrupt here unnecessarily, but if it can be understood that defendants object to the witness being permitted to put into the record his interpretation of words which appear in the Packers and Stock Yards Act, then I will not make separate objections each time. However, we do object to anything other than a statement by this witness of the facts as to the way this livestock is handled and the way they want it to be handled.

Mr. Rynder: Mr. Tally, aside from any use of any word——

Mr. Smith: That is, as distinguished from any attempt to give a meaning to words used in the Packers and Stock Yards Act.

Mr. Rynder: Let me ask you this, Mr. Tally:

By Mr. Rynder:

Q. Aside from any use of any word in the Packers and Stock Yards Act, through your own experience have you come to have an opinion of your own and knowledge of your own as to what is meant by the marketing of livestock at the Union Stock Yards?

A. Offering it for sale for buyers that are on the market.

Q. Will you elaborate on that a little bit? Just what happens?

A. Well, livestock generally is shipped into Chicago by producers or others consigned to commission houses whom they designate. The livestock is then, on its receipt at the Chicago Union Stock Yards handled by the stock yards [fol. 64] employees to pens assigned to that commission house.

Mr. Smith: Just a moment, please. Mr. Reporter, please read the last answer of the witness.

(The answer was read.)

By Mr. Rynder:

Q. What happens to the livestock in those pens?

A. Then the employees of the commission houses show the livestock to buyers and offer them for sale at a price they may indicate.

Q. Do buyers or employees of the buyers come to those same pens and examine the livestock and make bids?

A. They do, yes, sir.

Q. Do they sometimes agree on a price and purchase the livestock?

A. They do, yes, sir.

Q. And at other times do they disagree, and that particular buyer goes on his way?

A. Yes, sir.

Q. Now, does all of that constitute what in your opinion, at least, means "marketing of livestock"?

A. Yes, sir.

Q. And from that standpoint, on your direct shipments do you desire to use any of those marketing facilities?

A. No, sir.

Q. Now, as to the feeding of livestock, may I ask you whether you have any idea as to what the feeding of livestock means?

[fol. 65] A. Yes, sir.

Q. What is it?

A. The feeding of livestock means——

Mr. Smith: As used in the Packers and Stock Yards Act?

Mr. Rynder: No; as commonly referred to in the business of the yards.

Mr. Smith: That is, you are asking him what it means to feed livestock; is that it?

Mr. Rynder: Yes.

Exam. Carter: At the Union Stock Yards.

Mr. Rynder: At the Union Stock Yards.

Mr. Smith: All right.

By Mr. Rynder:

Q. What does that mean, Mr. Tally?

A. The meaning of "feeding livestock at the Union Stock Yards" would be to place them in such locations where facilities are available to supply the animals with hay, corn or such other commodities that may be normally fed livestock, depending upon their class.

By Exam. Carter:

Q. You say, to place them in such position?

A. Such facilities.

Q. Who does that placing?

A. Stock yards company employees.

By Mr. Rynder:

Q. Now, does the feeding of livestock as carried on at the Union Stock Yards require—or, at least take place in pens that are provided with watering troughs and pens [fol. 66] that are provided to give hay to cattle or corn to hogs as the case may be?

A. Yes, sir.

Q. What does your observation show as to who places the hay or the corn or oats, whatever it may be, for the feeding of the animals?

A. The stock yards employees.

Q. The stock yards employees?

A. Yes, sir.

Q. That is all done in the stock yards pens properly equipped for that purpose?

A. Yes, sir.

Q. Now, do you desire any such service in connection with the receipt of your direct shipments of livestock?

A. No, sir.

Q. What is the fact as to whether or not you move them directly to your plant without feeding?

A. We do move them directly to our plant without feeding. If they are to be fed, they are fed over in our own properties and packing house locations by our own employees.

Q. The next item I was asking you about has probably been partly covered. You have partially described that in connection with feeding.

A. Yes.

Q. As conducted at the Union Stock Yards.

[fol. 67] A. Yes.

Q. Very briefly, what does that consist of?

A. It means the placing of livestock in the proper facilities so as to enable the livestock to be watered in a sanitary, clean way. Pens are equipped with drinking facilities to bring about that result. All pens are not so equipped.

Q. As a matter of fact, at the stock yards are what will be shown later as unloading pens; are those pens equipped, or not, with facilities for feeding and watering?

A. Whether there are not any, I cannot say; but my observation would be that 90 per cent of them do not have such equipment.

Q. Have you ever seen any that have?

A. No, sir.

Q. Did you make a recent personal visit through that portion of the stock yards and observe all of the unloading facilities?

A. I did.

Q. Did you find any pens that were equipped to feed and water?

A. No, sir.

Mr. Smith: May I inquire what pens you are talking about?

The Witness: The unloading pens.

Mr. Rynder: Unloading pens.

Mr. Smith: He is talking about unloading pens?

Mr. Rynder: Unloading pens.

Mr. Smith: What do you mean by "unloading pens"?

The Witness: Pens that the livestock is unloaded into [fol. 68] from the livestock cars, otherwise known as chutes, generally.

Mr. Smith: Sometimes referred to as chute pens?

The Witness: Yes, sir.

By Mr. Rynder:

Q. But after you get out of the unloading pens as indicated on exhibit No. 1, do you then get into a group of pens that are properly equipped to feed and water livestock?

A. Yes, sir.

Exam. Carter: And are they usually described as holding pens? Are they, or are they not? Is that incorrect?

A. Well, the general layout of the stock yards area does not necessarily describe them only as holding pens. They may be watering pens, feeding pens, or holding pens, or a combination of all three. Some have those facilities and some do not.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. Mr. Tally, can you indicate on exhibit 1 what you have referred to as the unloading pens distinguished from holding pens or other pens that have facilities for feeding and watering?

A. The unloading pens I have in mind shown on exhibit 1 are those right adjacent to platforms Nos. 1, 2, 3, 4, and so forth. The stock is unloaded from the cars and there are inclines leading down into the pens. Those pens are used entirely for the unloading of the livestock into such pens. They are never used, to my knowledge, for any other purpose.

Q. Now, on your shipments of directs, do you desire or re- [fol. 69] quire any watering of those animals after the livestock trains have arrived and the livestock has been moved from the cars into the unloading pens?

A. No, we do not.

Q. If the animals need watering, what do you do about it?

A. We water them with our own facilities over at our own locations by our own employees.

Q. You do not have the stock yards do that?
A. No, sir.
Q. Do you know what, in the business of the stock yards is generally referred to as "holding" aside from marketing or unloading?
A. No, other than holding——

Mr. Smith: I did not get that answer.
The Witness: — them for disposition.
Mr. Smith: I did not get that answer. Read it please, Mr. Reporter.

(The answer was read.)

By Mr. Rynder:

Q. There is the holding by the livestock company of certain classes of livestock?
A. Yes, there is, holding for disposition, or holding for outbound shipment.
Q. Is there also a holding for the commission men who sell the livestock?
A. Yes, sir, being held in the control of the stock yards [fol. 70] company while in the pens of the stock yards company assigned to the commission man who is offering such livestock for sale. It is entirely under his jurisdiction.
Q. Do you desire or require any holding by the stock yards company of your direct shipments?
A. We do not.
Q. Broadly speaking, what is the proposition that you have and the demand you have made on the railroads as indicated in exhibit No. 2, about holding livestock?
A. Our demand has been to make delivery of such livestock at the unloading pens, so that we may take it to our locations and not to be placed in the holding pens.
Q. Does that mean your crews would be ready at any hour of the day or night to move livestock out of the unloading pens immediately upon their unloading?
A. Yes.
Q. Without any holding?
A. Yes.

Exam. Carter: This might be a good time to recess. Off the record.

(Discussion outside the record.)

Exam. Carter: At this time we will recess until quarter of two.

(Whereupon, at 11:15 A. M., adjourned until 12:45 P. M., Central Standard Time.)

[fol. 71] Afternoon Session, 12:45 P. M.

Exam. Carter: Come to order, gentlemen. You may proceed.

G. F. TALLY, having been previously sworn, resumed the stand and testified further as follows:

Direct examination (Cont'd).

By Mr. Rynder:

Q. Mr. Tally, have you an understanding of the word "delivery" as it is applied in stock yards transactions at the Union Stock Yards at Chicago?

Mr. Smith: I am sorry, but I did not hear that question. Read it to me please, Mr. Reporter.

(The question was read.)

A. In my opinion delivery of livestock at the Union Stock Yards at Chicago means delivery to the final buyer.

Q. Perhaps the Examiner will not understand just what you mean by that answer, so will you explain that a little more, please.

Exam. Carter: Are you asking him from a transportation standpoint or a commercial standpoint?

Mr. Rynder: Simply what the word "delivery" means in the transactions of the Union Stock Yards.

Mr. Smith: I object to that, if the Examiner please, because it has not been shown that there is any understanding or use of the word "delivery" at the Union Stock Yards. I think the Commission is as well able to look at the Packers and Stock Yards Act and take that word "delivery" [fol. 72] and apply the proper meaning to it, as is this witness. We object to that as calling for a conclusion of the witness and not being any statement of fact.

Mr. Rynder: It is not a conclusion of the witness, Mr. Examiner. I think as the witness goes along it will be shown that there are two or three things which are known as "delivery", as business transactions. We will forget the Pack-

ers and Stock Yards Act for the time being. We will forget the Interstate Commerce Act for the time being. There are two or three transactions out there which are commonly known as constituting delivery, in the actual movement of the stock.

Mr. Smith: The only possible reason for asking this witness, if the Examiner please, to offer any opinion as to the meaning of the word "delivery", is to relate that to the Packers and Stock Yards Act and give it an interpretation which would exclude the handling of those animals. We object to it as not being proper testimony.

Mr. Rynder: I do not think counsel can object to my putting in my case because it may be I am trying to show facts beneficial to my client. I think if this witness knows the situation and knows the several kinds of deliveries that are ordinarily made in and around the stock yards properties, he may state that.

Exam. Carter: Will you reframe your question along that line?

[fol. 73] Mr. Rynder: I think that is all I asked.

Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

Mr. Rynder: I can put it this way, if you please:

By Mr. Rynder:

Q. Mr. Tally, are you acquainted with the several types of deliveries that are made of livestock at the Union Stock Yards in Chicago?

A. Yes, sir.

Q. Now, suppose a commission man is dealing on the yards, and certain pens are assigned to him.

A. Yes.

Q. Is livestock delivered to that commission merchant after it arrived and is unloaded by the Union Stock Yards Company?

A. Yes, sir.

Q. Is that term customarily applied to that transaction?

A. Yes, sir.

Q. Suppose that after that commission man has made a sale of the livestock—let us assume that in the first instance it is to a packer buyer at Chicago. Is another delivery of the livestock then made?

A. Yes, sir.

Q. Of what does that delivery consist?

A. To pens made available for——

Q. Let us start with the commission man's pens.

A. All right.

[fol. 74] Q. What is that?

A. From the commission men's pens it is taken over to the scales and weighed.

Q. That is the stock from the commission man's pens?

A. Yes.

Q. Is that what you mean?

A. Yes. It is weighed by stock yards employees. From there they are placed in pens made available to the buyer of the livestock.

Q. And from those pens the buyer of the livestock can take them by any route or means available to his packing plant?

A. Yes, sir. He must give a receipt to the stock yards employees for the livestock.

Q. Now, suppose a shipment comes into the Chicago market and is bought by an order buyer for transportation to New York.

A. Yes.

Q. Is there any other sort of delivery made there?

A. Yes, sir.

Q. Please tell me what that delivery is.

A. The stock is then taken from the pens of the commission man over to the scales and weighed, and from there to pens available for the outbound loading of livestock in cars for shipment to whatever destination they may be consigned to.

Q. Now, suppose a shipment of your directs comes in: what kind of delivery is effected?

[fol. 75] A. Delivery is made to the employees of the—of Swift and Company at least—at pens where the stock is held waiting for such employees to arrive.

Q. Is it also made at the unloading pens themselves?

A. It is at times, yes, sir.

Q. Do you think of any other kind of delivery which may be performed?

A. (No answer.)

Q. Let me ask you this: suppose a trader or speculator on the yards buys some livestock from commission men?

A. Deliveries are made from the commission men to pens assigned to the trader on the Chicago Union Stock Yards

market, and if they are resold by him, then delivery is again made to whoever he might make the sale to, or to the pens made available for outbound loading of shipments.

Q. Now, out of these several deliveries that you have described, is there any that you desire or require on your directs except the ability to obtain them from the unloading pens?

A. None whatever, no, sir.

Exam. Carter: Let me ask you one question, although not exactly on the question of delivery.

By Exam. Carter:

Q. You said in the case of direct shipments the stock is sometimes taken from the hold pens or holding pens by employees of the packers, and that the stock is put into those holding pens awaiting the arrival of the packer's em- [fol. 76] ployees. Is that correct?

A. Yes, sir.

Q. Can you tell us where those holding pens are located?

A. The unloading chutes are right adjacent to the unloading platform where the train comes in and cars are unloaded and livestock driven down into these pens. Just beyond these unloading chutes is an alley. In the case of one or two of those alleys, they run the entire length of the width of the stock yards.

Mr. Rynder: Will you point that out on Complainants' Exhibit No. 1 so that the Examiner can see where those pens and alleys are?

Exam. Carter: I have seen that. I know what the situation is. I know what the alleys look like.

The Witness: Just across from the alleys on exhibit 1, using No. 1 as an example, are holding pens or other pens located within that area. They are not at all times held in the unloading chutes. They are driven across into the holding pens or such pens as they may assign them to, and call them holding pens, until the employees of Swift and Company get the stock. That has been the practice—that is the practice that has been in vogue for a number of years. That is one of the reasons for the cause of this complaint.

By Exam. Carter:

Q. Are the holding pens for direct shipments in all instances in the particular block of holding pens which ad-
[fol. 77] joins the alleys?

A. Generally, yes, but it may be in other parts of the district for the convenience of the stock yards company. There is no advantage in them driving them any further than is necessary.

By Mr. Rynder:

Q. Mr. Tally, the use of those so-called holding pens at the present time is over your protest, is it not?

A. Yes.

Mr. Smith: I am sorry, Mr. Rynder, I cannot hear you.

Mr. Rynder: I am asking Mr. Tally if the use of those holding pens, aside from the unloading pens, at the present time is not over the protest of his company.

Mr. Smith: All right.

The Witness: The answer is "Yes".

By Mr. Rynder:

Q. Were you advised by the Union Stock Yard and Transit Company that you would not be permitted to take shipments from the unloading pens by the nearest egress to a public street to be designated by them without the payment of a yardage charge?

A. Yes, sir.

Q. I call your attention to the following statement appearing in a letter of the Union Stock Yards and Transit Company of Chicago, at page 108 of exhibit 2: "Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, [fol. 78] this company will not permit livestock consigned to you at its yards to be delivered to you or to your employees, on and after May 25, 1933." Were you prepared at that time to have your own crews take all of the livestock at the unloading pens?

A. Yes, sir.

Mr. Rynder: In that connection I would call the attention of counsel for the defendants and of the Examiner to the letters on page 106 and 105 of exhibit 2.

Mr. Smith: If I may interrupt a moment off the record——

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: It is understood between counsel for the complainant and defendants that Mr. Mayfield may be excused from any further questions with respect to these letters embodied in Complainant's Exhibit No. 2, from the defendants, and further that if any errors are found at the time of the close of the hearing or very shortly thereafter, note may be taken of that in the record.

Mr. Rynder: I believe if any errors were so found, counsel could settle them and report to the Commission.

Exam. Carter: I just do not recall whether you had a specific objection to the admissibility of the exhibit or not.

Mr. Smith: My position was this, on behalf of the defendants, if the Examiner please: as I see it, the letters [fol. 79] are immaterial, incompetent and they are self-serving on both sides. I think that is a fair statement. However, they are here and I do not care to be in the position of making formal objection to them.

Mr. Rynder: I suppose since there is no formal objection—well, I would like to suggest an answer to the contention by Mr. Smith that they are not material. There was some suggestion, I believe, in the Supreme Court decision in the H. grade case that a practice had grown up here that lasted for nearly 65 years, and so forth. Perhaps that was true. The first group of letters were demands upon the railroad companies for substantially the same thing we are requesting in this complaint. The letters tend to show this is not a proposition started with the filing of this complaint, but that we have been persisting in that demand. The letters show the replies that have been made by the railroads. I do not think they are bound by these replies, if they have some other sound reasons, but at least they show what replies were made. Particularly, to my mind, they show why we have had to use the facilities to a certain degree of the stock yards company during the period for which we are asking reparation. Those letters are at pages 105, 106, 107 and 108. Then the later group of letters shows the renewal of a demand substantially the same in purpose, but slightly different in form, on Septem-

ber 9th, 1935, which was later than the date of the tariff [fol. 80] publication to which we will call your attention presently, and which we think gave us a right in one way or another to what we were demanding in September, 1935. Now the importance of the date, if any, of the tariff publication which will be presently mentioned is that the period for which reparation is sought, being only two years under the Commission's rules, goes back only to this last demand.

Exam. Carter: Very well. Complainant's Exhibit No. 2 will be received in evidence.

(Complainant's Exhibit No. 2, Witness Tally, received in evidence.)

Exam. Carter: Proceed.

By Mr. Rynder:

Q. Mr. Tally, is there a practical application and meaning at the Union Stock Yard and Transit Company of Chicago, in the transactions there, of the word "shipment"?

Mr. Smith: That is objected to as incompetent and immaterial.

Exam. Carter: Had you finished your question?

Mr. Rynder: Yes.

Exam. Carter: Read the question, please.

(Question read.)

Exam. Carter: You do not object to the form of the question, do you? Or, do you object to the form of the question?

Mr. Smith: I do not object to the form of it, no. I object to the substance of it, the substance of it being that [fol. 81] we have the word "shipment" in the Packers Act and the effect of this question is to ask the witness what that word means. I do not believe he is competent to answer. I do not think that is a question of fact. That is not a question that ought to be propounded to this witness.

Mr. Rynder: I am not asking the witness what the word "shipment" means in the Packers and Stock Yards Act. I am asking whether there are particular transactions at those yards to which that term is generally applied.

Exam. Carter: You may answer the question. I will overrule the objection.

By Mr. Rynder:

Q. Answer the question, Mr. Tally.

A. The word "shipment" at the Union Stock Yards at Chicago means the shipping of livestock from the Union Stock Yards Company of Chicago. There are many order buyers purchasing livestock on the market for the account of interests located elsewhere, which require transportation to arrive at such destinations. The stock yards company——

Q. Let me stop you for a moment.

A. Yes.

Q. What would be an example of that, an order buyer at Chicago for a packer in New York?

A. Yes, sir.

Q. Go ahead. What would happen in connection with such transaction?

[fol. 82] A. The livestock is purchased from the commission merchant with instructions to have the livestock shipped to his principals at New York City. That in turn is transmitted to the stock yards company employees. The stock is weighed and driven to the holding pens for shipment and loading into cars when the train of cars is made available.

Q. In that connection, does the order buyer or whoever the shipper may be, give to the stock yards company some kind of slip or memorandum or order showing the pens in which those livestock are located and the railroad by which they are to be shipped out?

A. He does.

Q. Through its facilities does the stock yards carry out the wishes of the shipper, order buyer or the other person who makes the shipment?

A. Yes. Generally the stock is sold—or, purchased in the name of a principal the order buyer represents, and he is usually representing an eastern consignee.

Q. Do you know of any other use of the word "shipment" in the transactions that actually go on at the Union Stock Yards and Transit Company?

A. I do not believe I do.

Q. You do know it is applied to the transaction you have described?

A. Yes, sir.

[fol. 83] Q. Now, is there any service in connection with shipments such as you have described, desired or required

by your company in connection with the receipt of direct shipments of livestock?

A. No, sir. They are not to be shipped.

Mr. Smith: Let me hear that question again. Read it please, Mr. Reporter.

(Question read.)

By Mr. Rynder:

Q. Chicago is the final destination of those shipments, in other words, then?

A. Yes, sir.

Q. Now, is weighing of livestock frequently performed by the Union Stock Yard and Transit Company of Chicago?

A. Yes, sir.

Q. Could you give some examples of the purpose for which weighing is done?

A. One of the principal reasons for which weighing is done is to determine the result of the transaction, the amount of dollars and cents involved.

Q. Is it done in one instance to furnish weights to the railroads for the collection of freight charges?

A. Yes, sir. That is another instance.

Q. Then is it done to determine as between purchaser and seller on the yards, the exact amount to be paid for?

A. Yes, sir.

Q. Is such weighing by the stock yards company desired [fol. 84] or required by your company in connection with the transportation to Chicago of direct shipments?

A. No, sir.

Q. Please explain why you do not need that for either the payment of freight bills, or for any other purpose.

A. We have installed our own scales which are properly authorized and tested by the Western Weighing and Inspection Bureau, an agency maintained by the railroads for that purpose. Such scales are on our own property operated by our own employees, the weighmaster being on our own payroll, but bonded and authorized and accepted as the representative of the Western Weighing and Inspection Bureau, who is the authorized agent of the railroad companies.

Q. So, do you need any service by the Union Stock Yard and Transit Company on direct shipments, any service of weighing either for the purpose of paying your freight

bills to the railroads or for the purpose of determining for your own account and your own satisfaction the exact amount of livestock received?

A. No, sir.

Q. Do you desire or require any degree of handling by the Union Stock Yard and Transit Company after the livestock has been unloaded from the inbound cars into what are commonly called unloading pens?

A. No, sir.

Q. Why not?

[fol. 85] A. Because we are ready and willing to take the livestock at the unloading pens, by our own employees, under our control and need no further handling by the stock yards company.

Q. Do you know whether the unloading chutes or pens of the Union Stock Yard and Transit Company have in fact been made the delivery facilities of the defendants——

Mr. Smith: That is objected to.

By Mr. Rynder:

Q. (Continuing)—for the delivery of livestock in Chicago?

Mr. Smith: That is objected to as not calling for any statement of fact, but for a conclusion of the witness. It is incompetent.

Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

By Exam. Carter:

Q. Do you know whether they have or not?

A. They have, yes, sir.

Q. How do you know that?

A. By the publication of rates to Chicago, which include the Union Stock Yard and Transit Company at Chicago; and, the tarrif-s of the defendant carriers provide the allowance they will make for the unloading of livestock as to the Union Stock Yard and Transit Company at Chicago, Illinois.

Mr. Smith: I move to have that stricken as not the best evidence. The reference to the actual tariffs from which this deduction is drawn will be in the record.

[fol. 86] The Witness: That is right.

Mr. Rynder: It will be in the record on our side very soon. If that is objectionable, Mr. Examiner, I will ask the witness another question.

By Mr. Rynder:

Q. Are you acquainted with the livestock facilities maintained in the city of Chicago for the delivery of livestock by line haul carriers?

A. Yes, sir.

Q. Are there any adequate facilities other than those which the carriers maintain either by themselves or by allowance or lease or grant at the Union Stock Yard and Transit Company of Chicago?

Mr. Smith: That is objected to as calling for a conclusion of the witness. I do not have the slightest objection to this witness, if he knows the facts, stating the facts with respect to what these other facilities are.

Mr. Rynder: Well, let me say this—excuse me.

Mr. Smith: But, I do object to the witness being asked and answering as to whether certain facilities not yet described are in his judgment adequate.

Mr. Rynder: Then I will change it, and put it in a little different way.

By Mr. Rynder:

Q. Does the Alton Railroad Company maintain any facilities adequate for the delivery of livestock within the city of Chicago?

[fol. 87] Mr. Smith: The same objection.

Mr. Rynder: The objection is to the word "adequate"?

Exam. Carter: I assume it is.

Mr. Smith: Yes.

Mr. Rynder: What I mean by that is this:

By Mr. Rynder:

Q. Does the Alton Railroad Company maintain any facilities where four or five carloads of livestock can be unloaded within the city of Chicago?

A. I do not know of any.

Q. Have you examined that situation over a period of years?

A. Yes, sir.

Q. Does the Atchison, Topeka & Santa Fe Railway Company maintain any facilities in the city of Chicago where four or five loads of livestock can be unloaded and delivered?

A. To my knowledge they do not, no, sir.

Mr. Smith: What is the answer?

The Witness: To my knowledge they do not.

By Mr. Rynder:

Q. Does the Baltimore & Ohio Railroad Company maintain any such facilities within the city of Chicago?

A. Not to my knowledge, no, sir.

Q. And have you knowledge?

A. I believe so, yes, experience over a considerable time.

Q. Does the Chicago & Eastern Illinois Railway Company maintain any facilities adequate for the delivery of four or five cars of livestock in the city of Chicago?

[fol. 88] A. No, sir.

Mr. Smith: I would like to ask the witness at this juncture, if I may, the basis for these replies.

Mr. Rynder: All right.

By Mr. Rynder:

Q. Mr. Tally, have you examined every one of these so-called outlying places where there is a broken down chute or two, or perhaps places not fenced in, in and about Chicago?

A. Well, I have made inspection trips in and around Chicago to points not located in Chicago that might be considered delivery terminals of the defendant carriers and found no facilities that in my judgment would satisfactorily handle livestock in any volume, in any sanitary condition.

By Mr. Smith:

Q. Do you have any knowledge as to whether or not they are adequate to handle shipments that are received by the carrier for delivery at those points?

A. If there were one carload it might be possible.

Q. Do you know whether there is one carload or more carloads tendered for delivery at those points?

A. No, I do not, because from my inspection of the condition, it did not indicate there was any livestock for those points.

Mr. Smith: Go ahead.

By Mr. Rynder:

Q. Do you know whether the Chicago, Burlington & Quincy Railroad Company maintains any facilities other than those at the Union Stock Yards?

[fol. 89] A. Yes. The Burlington has some facilities at what we call Clyde, Illinois, I do not know whether that is even in the city limits of Chicago. It would not be a Chicago delivery. It would be a Clyde, Illinois, delivery. They have some few pens out there, but it is not regularly used for the handling of livestock—the indications being, rather, that it has not been used for quite some period.

Q. I will ask you, Mr. Tally, the same question as to the Chicago Great Western Railroad Company.

A. I do not know of any pens they have.

Q. That is, your own information and knowledge is that they have no pens for delivery in Chicago?

A. Yes.

Q. Is that correct?

A. That is right, yes, sir.

Q. How about the Chicago, Indianapolis & Louisville Railway Company?

A. I do not know of any pens available on that railroad.

Q. The next defendant here, the Chicago Junction, is the line over whose rails livestock is delivered at Chicago?

A. At the Chicago Union Stock Yards, yes, sir.

Q. How about the Chicago, Milwaukee, St. Paul & Pacific Railroad? Does it have pens for delivery of four or five or more carloads of livestock in the City of Chicago?

A. No, sir. They have some facilities out at this western [fol. 90] break-up yard of theirs. I do not believe I can recall the name of it.

Mr. Smith: Benson.

The Witness: Benson, yes, sir.

By Mr. Rynder:

Q. Is that within the city limits of Chicago?

A. I do not think that is within the city limits of Chicago, but that is not operated to take care of the handling of livestock.

Q. I will ask you the same question as to the Chicago, Rock Island & Pacific Railway Company.

A. The only locations that I have knowledge of on the Chicago, Rock Island & Pacific Railway Company are at Blue Island, Illinois. That is not within the city limits of Chicago. That is a very limited capacity that they have.

Q. How about the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company?

A. There is not any—I do not know of any locations that they have.

Q. What about the Erie Railroad Company?

A. The same answer.

Q. What about the Grand Trunk?

A. The Grand Trunk has some facilities out here in the southwest part of Chicago, around 49th Street. At one time one of the packers located in the Chicago district, arranged for delivery of direct shipments at that point; but, the facilities were very limited, and I think they did add some on [fol. 91] to it, but that has been discontinued. For some reason they discontinued the practice of accepting them at that point.

Q. How about the Illinois Central?

A. The Illinois Central I believe has some around Burnside, Illinois. They are limited.

Q. Is that outside of the city of Chicago?

A. No. I believe that is within the city limits of Chicago.

Q. Would you say it is more than two or three pens?

A. Not any more than that.

Q. What about the Michigan Central?

A. I do not know of any facilities they have.

Q. What about the Minneapolis, St. Paul & Sault Ste. Marie Railway Company?

A. I do not know of any they have.

Q. The New York Central?

A. The only facilities they would have that I have any knowledge of are at Indiana Harbor, which is not within the city limits of Chicago.

Q. Is that across the state line in Indiana?

A. Yes, sir.

Q. How about the New York, Chicago & St. Louis Railroad?

A. I do not know of any that they have.

Q. What about the Pennsylvania Railroad Company?

A. I do not know of any.

Q. What about the Wabash Railway Company?

[fol. 92] A. I understand that recently the Wabash Railway installed some facilities down near Archer and Canal Streets where there are some interests taking shipments consigned direct to them, and trucking from that point to their locations.

Q. Now, is it the customary practice for the line haul defendants I have mentioned to bring their livestock, in whatever quantities they have it, frequently trainloads, to the unloading facilities of the Union Stock Yard and Transit Company of Chicago?

A. Yes, sir, it is.

Q. Is there any other facility in Chicago at which the quantities of livestock brought to Chicago can be handled except at the Union Stock Yards and Transit Company?

A. No, sir.

Mr. Smith: That is objected to as calling for a conclusion of the witness.

Mr. Rynder: I think it is a conclusion of fact.

Exam. Carter: That is his own opinion. I will overrule the objection.

By Mr. Rynder:

Q. Mr. Tally, have the carriers through their tariff publication provided for the Union Stock Yard and Transit Company as a terminal on their line to which they publish rates?

A. My understanding is that they have in fact been made the delivery facilities of the carriers. This is based upon the following facts: the line haul carriers, defendants in this [fol. 93] case, publish in their tariffs an allowance of $1.25 single deck and $1.50 double deck to be paid to the Union Stock Yard and Transit Company of Chicago for unloading livestock into its unloading pens. The Union Stock Yard and Transit Company also files with the Interstate Commerce Commission as a common carrier its tariff I. C. C. 12, naming its charge of $1.25 single deck and $1.50 double deck for services of unloading livestock from the cars. I desire to emphasize that this unloading charge is published by the Union Stock Yard and Transit Company not for any truck yard service, but is published by it as a common carrier in a tariff filed with the Interstate Commerce Commission and is identified as U. S. Y. & T. Company tariff No. 9 I. C. C. 12.

Q. Just a moment there, Mr. Tally.
A. Yes.
Q. Do you have that tariff with you?
A. Yes, sir.

Mr. Rynder: The subject matter is short, Mr. Examiner. I would like to get it into the record merely to show it publishes that charge as carriers agent.

By Mr. Rynder:

Q. Please read the item, Mr. Tally, in the tariff you just mentioned.

A. I am going to read from U. S. Y. & T. Company tariff 9, I. C. C. 12.

Exam. Carter: Effective when?

[fol. 94] The Witness: Effective December 1, 1934. "The charge made by this company for the service (as carrier's agent) of loading and unloading livestock at the Union Stock Yards of Chicago, Illinois, is as follows: for loading, $1.25 per single deck car; $1.50 per double deck car. For unloading, $1.25 per single deck car; $1.50 per double deck car."

By Mr. Rynder:

Q. You have already stated that the charge published in the tariff of the Union Stock Yard and Transit Company published and filed with the Commission, the Interstate Commerce Commission, is absorbed in toto by the line haul carriers.

A. Yes, sir.

Q. Is that correct?

A. Yes. We desire no service beyond the transportation and unloading of the livestock which is covered by the line haul tariff of the defendants, plus the tariff of unloading charges of the Union Stock Yard and Transit Company, which is absorbed by the defendants as required by law.

Q. When such direct shipments are consigned to your company at Chicago, what charges are you now required to pay in order to obtain delivery of such livestock?

A. We are required to pay the line haul rates of the defendant carriers for the transportation of livestock to Chicago, plus 45 cents per head for cattle, 35 cents per head for calves, 15 cents per head for hogs, and 10 cents per head for sheep.

[fol. 95] Q. Are these latter charges of 45 cents, 35 cents, 15 cents and 10 cents per head, respectively, published in any tariff filed with the Interstate Commerce Commission?

A. They are not.

Q. From what source are such charges obtained?

A. They appear in amendment No. 3 to U. S. Y. & T. Company No. 10, which is a schedule of charges filed by the Union Stock Yard and Transit Company of Chicago with the secretary of agriculture. This schedule is shown in exhibit No. 3.

Exam. Carter: Just a moment, please.

By Exam. Carter:

Q. Are these charges designated by any particular name in the tariff?

A. Yes.

Q. How are they designated?

A. As yardage charges.

Mr. Rynder: Wait a minute, Mr. Tally. I will give you this so you can get it direct.

The Witness: I am reading from amendment No. 3 to U. S. Y. & T. Company No. 10, which reads as follows: "Yardage charges: the following yardage charges will be made on all livestock received at these yards: cattle, 45 cents per head. Calves (400 pounds or under) 35 cents per head. Hogs, 15 cents per head. Sheep and/or goats, 10 cents per head. Horses and mules, 50 cents per head." In addition, there is a reference mark A carried, which states: "A serv-[fol. 96] ice and weighing charge, equal to one-half of the above yardage, will be assessed on all livestock weighed over our scales the second and successive times."

By Mr. Rynder:

Q. In effecting delivery of livestock shipments to unloading platforms and chutes of the Union Stock Yard and Transit Company, is a switching service performed by the Chicago Junction Railway or do the line haul carriers themselves bring their trains to those unloading chutes?

A. The line haul carriers bring the trains of livestock under their own power and by their own employees direct to the unloading chutes upon the property of the Union Stock Yard and Transit Company.

Q. By the way, do they remove them in the same way?

A. Yes. They take the empties out by their own power and by their own employees.

Q. Do the line haul defendants in this case publish in their tariffs a rate to the unloading chutes of the Union Stock Yard and Transit Company at Chicago?

A. They do.

Q. What is that rate?

A. It is uniformly the rate to Chicago on livestock.

Q. Please explain the manner of publication by which the line haul defendants make the rates to Chicago on livestock applicable to deliveries at the unloading chutes of the Union Stock Yard and Transit Company..

A. I have prepared an exhibit which contains extracts [fol. 97] from representative line haul carrier tariffs that provide for the application of the rate on livestock to Chicago, Illinois, to apply to deliveries at the Union Stock Yards.

Q. Do you have that handy?

A. Yes.

Mr. Ryuder: Mr. Examiner, I ask that the document to which the witness just referred be marked for identification as Complainant's Exhibit No. 4.

Exam. Carter: Very well. It may be so identified.

(Complainant's Exhibit No. 4 marked for identification.)

By Mr. Rynder:

Q. Proceed, Mr. Tally.

A. Attention is directed to page 1 of exhibit 4, which is an extract from Chicago and North Western Railway Company tariff I. C. C. 10484, naming rates on livestock from stations in Iowa, Minnesota, North Dakota, South Dakota and so forth, to Chicago, Illinois. Item 70 of that tariff is reproduced in page 1 of exhibit 4. It states that, except as provided in item 50, rates named in this tariff, from or to Chicago, Illinois, apply only on shipments loaded or delivered on Chicago and North Western Railway tracks, or on shipments received from or delivered to connecting lines. For basis of rates applicable from or to points located on connecting lines within the Chicago switching district, see Agent R. A. Sperry's tariff No. 20-T, I. C. C. No. 242. The second portion of page 1 is reproduced merely because

reference, in item 70 above, is made to R. A. Sperry's tariff [fol. 98] No. 242. This tariff is no longer in effect, but it has been superseded by a tariff and item 85 provides that where reference is made to such tariff it will include reference to all reissues or amendments thereto. Page 2 of exhibit 4 is a reproduction or extract from item 75 of R. A. Sperry's tariff I. C. C. 365, and refers to R. A. Sperry's tariff 22-Z, I. C. C. No. 329, for list of industries located in the Chicago switching district, where the Chicago rate applies. Page 3 of exhibit 4 is an extract from R. A. Sperry's tariff I. C. C. No. 377, which shows The Union Stock Yard and Transit Company is an industry within the Chicago switching district, its location within Chicago, and the carrier serving such industry, The Union Stock Yard and Transit Company of Chicago. Page 4 is an extract from the Chicago Switching Committee's tariff I. C. C. No. 365, which provides for the rate bases applicable to the various receiving stations of the Union Stock Yard and Transit Company in the respective districts. It provides that industries located in the districts referred to in the left hand column are subject to rate basis 6, the extension for which is shown in later pages. Sheet 5 is an extract from section 10 of the Chicago Switching Committee tariff referred to and reproduces rate basis 6 as contained in that tariff. Attention is directed to the heading "Live Stock From or To Industries, Chutes or Sidings of The Union Stock Yard and Transit Company at Union Stock Yards." Under the subheading "Carloads—Inbound" it will be noted that [fol. 99] opposite the line haul carrier, the Chicago and North Western, which was referred to on page 1 of this exhibit, rate basis 5 is provided. This same rate basis, however, is applicable, as will be noted, in connection with all other line haul carriers shown in the second column from the left. Sheets 6 and 7 provide certain exceptions in connection with the application of rates to Chicago which, however, does not affect the shipments of livestock involved in this proceeding. It merely was reproduced in order to have the entire item in the exhibit. Page 8 is an extract from the Chicago Switching Committee tariff referred to, I. C. C. No. 365, which provides the basis for rate basis 5 referred to on the previous pages. Opposite rate basis 5 on this page, and likewise in that tariff, is the provision to apply the Chicago, Illinois, rates to such industries located within the Chicago switching district. As previously shown, this

includes The Union Stock Yard and Transit Company. I have with me a copy of the Chicago Switching Committee tariff from which these extracts are taken and which may be examined here if any party desires to do so.

Mr. Rynder: Mr. Examiner, I now offer in evidence Complainant's Exhibit No. 4.

Exam. Carter: Is there any objection?

(No response.)

Exam. Carter: Complainant's Exhibit 4 will be received in evidence.

[fol. 100] (Complainant's Exhibit No. 4, Witness Tally, received in evidence.)

By Mr. Rynder:

Q. So far as you know has there been any question as to the application of the Chicago livestock rates to deliveries at the Union Stock Yard and Transit Company unloading chutes?

A. I have never heard this application of the rates disputed. I prepared this exhibit merely because I was requested to show that the carriers had named the Chicago rates to the unloading chutes of the Union Stock Yard and Transit Company, and because such application is made through a somewhat complicated set of tariff references.

Q. Is the allowance by the line haul carriers to the Union Stock Yard and Transit Company for unloading and loading shown in exhibit 4?

A. Yes, on page 5.

Q. Notwithstanding this tariff publication of the Chicago livestock rates for deliveries at chutes of the Union Stock Yard and Transit Company, are you able to obtain such delivery of livestock by payment of said rates to Chicago?

A. No. As I have already said, we pay, in addition thereto, the charges assessed by the Union Stock Yard and Transit Company designated as yardage charges for stock yard services in its schedule filed with the Secretary of Agriculture, which covers services entirely aside from transportation.

[fol. 101] Q. Does the Union Stock Yard and Transit Company nevertheless, as a common carrier, or as a common carrier's agent, publish and file a tariff with the Interstate Commerce Commission covering its service in connection

with the unloading of livestock for the line haul carrier?

A. It does.

Q. Notwithstanding the fact that the U. S. Y. & T. Company, as a common carrier, publishes its charge for unloading livestock from the cars, are you unable to obtain delivery without the payment of the charges described by you and designated above as yardage charges?

A. That is true.

Q. What is the fact in this connection?

A. The line haul carriers publish livestock rates providing for delivery at the chutes of the Union Stock Yard and Transit Company of Chicago. The Union Stock Yard and Transit Company, acting in its capacity as a common carrier and not as a stock yards, files with the Interstate Commerce Commission its charge for unloading the livestock and, by reason of law, that charge is absorbed by the line haul carrier. Nevertheless, although the entire service of transportation and delivery desired by us is performed by the line haul carriers and the Union Stock Yard and Transit Company as a common carrier under a tariff filed with the Interstate Commerce Commission, we are unable to obtain delivery of the shipments without payment of an additional [fol. 102] charge for a service which is unnecessary. In other words, the delivery is so made that we are forced to use the facilities of a person or corporation entirely separate from the transportation agency with whom we have contracted for the transportation of our direct shipments of livestock, subjecting us to payment of charges for yardage, a service which is not a part of transportation and which is not required in connection with these shipments.

Q. Are you sufficiently familiar with operations at the stock yards so that you can state the service, or at least describe it approximately, which is performed by the stock yard company under the yardage charge assessed upon your direct shipments?

A. I am.

Q. Please describe what service is performed for yardage charges published in the stock yards tariff filed with the Secretary of Agriculture.

A. The service performed by the Union Stock Yard and Transit Company in connection with the yardage charge assessed includes generally placing livestock from unloading pens into holding pens adjacent to the unloading chutes. From the holding pens the stock yard company drives the

live stock to pens assigned to the commission houses who offer livestock for sale on the Chicago yards. In such pens the livestock is held by the Union Stock Yard and Transit Company in order that it may be shown by the commission men to prospective buyers and bid upon by such buyers. [fol. 103] There is no limit upon the time that such livestock may be held in the pens assigned to the commission men for that purpose, and the responsibility for the livestock continues to be in the Union Stock Yard and Transit Company. After the livestock has been purchased by a buyer from the commission man, the stock yard company then drives the live stock to a scale where it is weighed, which facility is provided by the stock yard company and operated by their employees, and for which no charge other than the yardage charge is made. After the livestock has been weighed on the scales of the Union Stock Yard and Transit Company by its employees, it is then driven to pens convenient for acceptance by the purchaser. What I mean to say in this connection is that, if it were bought by a Chicago packer, it would be placed in pens convenient to the plant of the packer. If it should be purchased by an order buyer from the east, it is placed in pens adjacent to the outbound loading facilities, also provided by the Union Stock Yard and Transit Company.

Q. Are any of the services which you have described as coming within those performed by the Union Stock Yard and Transit Company, for which it collects its yardage charge, necessary or desired by your company in connection with the delivery of direct shipments?

A. No.

Q. Are you familiar with the correspondence between [fol. 104] Swift and Company, the line haul carriers, and the Union Stock Yard and Transit Company of Chicago, which is contained in exhibit 2?

A. Yes.

Q. At all times since the first demands were made by Swift and Company upon the carriers for delivery of its direct shipments without any charge in addition to the transportation charges filed with the Interstate Commerce Commission, has Swift and Company, to your knowledge, been ready and willing to remove all direct shipments of livestock from the carriers' unloading pens by its own employees, over the nearest egress to a public street?

A. Yes. Swift and Company has been ready at all times to accept such shipments immediately upon their arrival in the unloading pens and to remove the livestock therefrom to its own plants, without any other use of the facilities of the Union Stock Yard and Transit Company.

Q. Why has it not done so?

A. It is my understanding, from my own connection with the matter, and from the correspondence, that it was denied the right to such action by the line haul carriers and the Union Stock Yard and Transit Company, as indicated in exhibit No. 2.

Q. To your knowledge is it a universal rule that where deliveries of livestock are made by railroad carriers at public stock yards the yardage charge is assessed, and the consignee required to pay such charge on direct shipments? [fol. 105] A. At a number of stock yards other than the Union Stock Yard and Transit Company of Chicago, the rule is the same as prevails at Chicago. On the other hand, there are important exceptions to this rule and it is by no means universal. I have made an examination of the schedules filed with the Secretary of Agriculture by the principal public stock yards of the United States and have prepared an exhibit showing the rules in effect at those yards, as set forth in the published schedules.

Mr. Smith: Mr. Examiner, I propose to show before the hearing is over the interpretation which the Secretary of Agriculture has actually put upon the provisions of the Packers and Stock Yards Act, which has been under discussion here, not by general evidence, but by the very specific showing of decisions that have been made, and I object to the showing counsel seeks to elicit by these questions as incompetent and not the best evidence and not the proper way to show the construction put upon the act by the tribunal charged with its administration.

Mr. Rynder: I am not attempting to show the construction put upon the Act; not at all.

Mr. Smith: That is the only thing that is important, that I can see.

Mr. Rynder: Well, if we come to that, the construction, Mr. Examiner, would be my way. I did not think I would raise this point, because I suppose it is a point for argu- [fol. 106] ment. But, the secretary in the Denver case, and the pending Chicago Stock Yards case and numerous others,

has held that these facilities for loading and unloading are transportation facilities, and they are not stock yards facilities. From the standpoint of valuation he has thrown out their income and he has thrown out their expense. But, I do not think we are here to argue about that. I think that is something we should save for our briefs. The thing I am showing here, factually, has nothing to do with the construction of a law, but with the fact principally that the carriers, and defendants in this case, have made arrangements at other public stock yards served by them for the delivery of their shipments—of their direct shipments, of course—without requiring the shipper to incur this yardage charge which obviously covers very many items other than mere delivery.

Mr. Smith: There is no issue as to discrimination here between the practice at this yard and some other yard. I submit, if the evidence which is proposed to be offered has not anything to do with the construction of the Act, and its application to Chicago, it does not have anything to do with this case, and it is immaterial.

Mr. Rynder: There is no issue of discrimination, that is true. But, it is alleged that the practice is unreasonable, and we are showing what certain of these defendants do at other important points where the deliveries are made to [fol. 107] public stock yards. I offer it not in support of any charge of discrimination.

Exam. Carter: I want to hear your question again before I rule on it. Read the question please, Mr. Reporter.

(Question read.)

Exam. Carter: I will permit that question to be asked and permit you to show the practice of the stock yards for the purpose of showing that it is an unreasonable practice.

Mr. Rynder: I would like to say—off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Rynder: I ask that tariff No. 6 of the Union Stock Yard Company of Baltimore, Maryland, be marked for identification as Complainant's Exhibit No. 5.

Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 5, marked for identification.)

Exam. Carter: We will recess for five minutes.

(Short recess.)

Exam. Carter: Come to order please, gentlemen. You may proceed, Mr. Rynder.

Mr. Rynder: Mr. Examiner, I next ask that a tariff of The Buffalo Stock Yards of East Buffalo, New York, be marked for identification as Complainant's Exhibit No. 6.

Exam. Carter: It may be so identified.

[fol. 108] (Complainant's Exhibit No. 6 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Union Stock Yard Company of New Jersey, Benning D. C. be marked for identification as Complainant's Exhibit No. 7.

(Complainant's Exhibit No. 7 marked for identification.)

Mr. Rynder: I next ask that tariff No. 6 of the Cincinnati Union Stock Yard Company at Cincinnati be marked for identification as Complainant's Exhibit No. 8.

Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 8 marked for identification.)

Mr. Rynder: I next ask that the tariff of The Cleveland Union Stock Yards Company of Cleveland, Ohio, be marked for identification as Complainant's Exhibit No. 9.

(Complainant's Exhibit No. 9 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Detroit Stock Yards, Detroit, Michigan, be marked for identification as Complainant's Exhibit No. 10.

Exam. Carter: It may be so marked.

(Complainant's Exhibit No. 10 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Belt Railroad and Stock Yards Company of Indianapolis, Indiana, be marked for identification as Complainant's Exhibit No. 11.

Exam. Carter: It may be so marked.

(Complainant's Exhibit No. 11 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Los An-

[fol. 109] geles Union Stock Yards Company of Los An-

geles, California, be marked for identification as Complainant's Exhibit No. 12.

(Complainant's Exhibit No. 12 marked for identification.)

Mr. Rynder: I next ask that the tariff of The Bourbon Stock Yard Company Incorporation, Louisville, Kentucky, be marked for identification as Complainant's Exhibit No. 13.

Exam. Carter: It may be so marked.

(Complainant's Exhibit No. 13 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Muncie National Stock Yards, Inc., be identified as Complainant's Exhibit No. 14.

Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 14 marked for identification.)

Mr. Rynder: I next ask that the tariff of the West Philadelphia Stock Yard Company, Philadelphia, Pennsylvania, be marked for identification as Complainant's Exhibit No. 15.

Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 15 marked for identification.)

Mr. Rynder: I next ask that the tariff of the Pittsburgh Joint Stock Yards Company, Pittsburgh, Pennsylvania, be marked for identification as Complainant's Exhibit No. 16.

Exam. Carter: It may be so marked.

(Complainant's Exhibit No. 16 marked for identification.)

Mr. Rynder: I next ask that the tariff of The Wichita Union Stock Yards Company, Wichita, Kansas, be marked [fol. 110] for identification as Complainant's Exhibit No. 17.

Exam. Carter: It may be so marked.

(Complainant's Exhibit No. 17 marked for identification.)

By Mr. Rynder:

Q. Mr. Tally, with respect to the stock yard tariffs that have been marked for identification as Complainant's Exhibits Nos. 5 to 17 both inclusive, did you request those companies to send you copies of the tariffs currently in effect?

A. Yes, sir.

Q. Did they do so?

A. Yes.

Mr. Rynder: Do defendants have copies of this next exhibit?

Mr. Smith: Yes. We have several copies.

Mr. Rynder: I next ask that the document purporting to be a statement showing rules applicable to shipments of livestock which provide delivery may be accepted at unloading pens without charge in effect at the following stock yards—and then listing the stock yards, be marked for identification as Complainant's Exhibit No. 18.

Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 18 marked for identification.)

By Mr. Rynder:

Q. Mr. Tally, did you take the documents which have been offered in evidence as Complainant's Exhibits Nos. 5 to 17 both inclusive and for the purpose of convenience copy into [fol. 111] exhibit No. 18 the provisions which indicate what can be done in connection with the delivery of livestock at the public stock yards there mentioned?

A. Yes, sir.

Mr. Smith: May I hear that question again? Read it to me please, Mr. Reporter.

(Question read.)

By Mr. Rynder:

Q. Will you proceed to explain exhibit 18, so far as may be necessary, Mr. Tally.

A. It will be noted that at the Baltimore Stock Yards provision is made that livestock will be delivered to the consignee at the unloading pens, which is not allowed at Chicago. There is no charge unless the consignee fails to remove the livestock promptly and the stock yard company has to perform service in connection therewith. Even in that event, the assessment is only a charge of $3.00 per car and not a yardage charge per head of livestock as is the case at Chicago.

Q. Mr. Tally, is there—or rather, are there defendants in this case which make delivery of livestock through the

Union Stock Yards Company of Baltimore, whose tariff is Complainant's Exhibit No. 5 for identification?

A. Yes, sir.

Mr. Smith: That suggests a point that I think we ought to make clear. I do not know whether it is Mr. Rynder's position, or whether he proposes to show that the rail car-
[fol. 112] riers serving these various points named on the exhibit which has been marked for identification as No. 18, by any tariff provision filed with the Interstate Commerce Commission, make any absorption of the stock yards charge on that livestock taken possession of immediately upon its being put in the unloading chutes. Are you going to connect it up in that way?

Mr. Rynder: The point is, they deliver their livestock at these yards. He will go into detail and name the rates if you want him to, but they name the rate to Baltimore and then the stock yards tariff, where they deliver their stock, provides they may be taken from the unloading pens without any further unloading charge.

Mr. Smith: This evidence, it seems to me, Mr. Examiner, might be at least relevant in a proceeding before the Secretary of Agriculture, if an attack were made upon the tariff filed by the Union Stock Yards of Chicago with the Secretary of Agriculture, with a view to showing that the tariff filed with the secretary by the Union Stock Yard and Transit Company of Chicago is unreasonable in that it does not make the exception that these tariffs—and there are relatively few in relation to all the tariffs—purport to make. It certainly does not have any relevancy unless it is connected up with something these defendants are doing or that other railroads are doing elsewhere, if that might bear on the question of reasonableness. I do not want to anticipate Mr. Rynder's case. I assumed he had something which
[fol. 113] would show that the rail carriers were involved in this, but he has not produced it yet.

Exam. Carter: I think in order to be relevant you have to connect that up.

Mr. Rynder: I think I was proceeding to do it when I was interrupted.

Exam. Carter: Very well. Proceed.

By Mr. Rynder:

Q. I will ask you this, Mr. Tally: do any of the defendants in this case effect deliveries of their livestock at Baltimore public stock yards?

Mr. Smith: That is objected to as immaterial. I do not see how we can possibly go into that subject, if the Examiner please.

Mr. Rynder: I can show that the railroads through their delivery agent have arranged at Baltimore and brought about a situation whereby we can get delivery at Baltimore without paying a yardage charge. That is the connection.

Mr. Smith: That is objected to as immaterial.

Exam. Carter: That is to establish an unreasonable practice at Chicago?

Mr. Rynder: I do not intend, and I am not trying to establish all of my case by one single point. However, this is one of the points showing that the situation we have in Chicago is not a universal situation. One reason I would like to show that is because I believe the Supreme Court [fol. 114] in the Hygrade case, as a universal situation—and also in the cases mentioned in the Hygrade case—seemed not to have this situation definitely before it. It merely remarked that at some other stock yards no such charges were made, but the train of events in the tariffs did not appear in the record.

Exam. Carter: I will let you proceed. I will overrule your objection, Mr. Smith, and receive it subject to your objection at this time.

Mr. Smith: If the Examiner please, let me say this:——

Exam. Carter: I may entertain a motion later to strike it out; I do not know.

Mr. Smith: Will your Honor withhold ruling on these exhibits until we can see whether or not Mr. Rynder has any evidence to show that the rail carriers have filed any tariff which would tend to bear on the reasonableness of the practice which the rail carriers maintain at Chicago?

Exam. Carter: Yes. Proceed.

By Mr. Rynder:

Q. Mr. Tally, does your company have a subsidiary operating at Baltimore?

A. It does.

Q. Do you know what charges it pays on livestock received there?

A. Only the transportation charges.

Q. Well, do you know what charges it pays?

A. It does not pay any charges for the delivery of its livestock.

[fol. 115] Q. That is at Baltimore?

A. Yes.

Q. It pays the line haul charges, does it not?

A. That is what I mean; the transportation line haul charge only.

Q. How are deliveries made at Baltimore?

A. Through the Baltimore Stock Yards.

Q. Whose tariff is shown as exhibit No. 5?

A. Yes, sir.

Q. What one of the defendants here makes such deliveries?

A. The Baltimore & Ohio Railroad and the Pennsylvania Railroad.

Mr. Smith: Just a moment. I do not want to be troublesome, but you are not saying that you do not pay any yardage charge at Baltimore if you do not take immediate possession of the traffic at Baltimore, are you?

Mr. Rynder: No.

The Witness: No, sir.

Mr. Smith: In other words, whether you pay the charges or not is governed, so far as the stock yards charge is concerned, by this tariff of the Baltimore Stock Yards Company you have already introduced, is that not so?

The Witness: Yes, sir.

Mr. Smith: All of this is objected to as not the best evidence. They have already put the tariff in here. That is the best evidence.

[fol. 116] Mr. Rynder: What we are showing here is at these other points of course we pay the yardage charge if we demand the stock yards facilities, but when we demand what we are seeking at Chicago we pay no stock yards charge.

Mr. Smith: I submit that the tariff will show that.

[fol. 117] Mr. Rynder: An immediate taking away of the property of the line haul carrier involves no yardage charge, whereas it does at Chicago.

Mr. Smith: That is what you offered the tariff to show.

Mr. Rynder: What?

Mr. Smith: That is what you offered the tariff at Baltimore to show, is it not?

Mr. Rynder: Yes.

Mr. Smith: I object to that as not the best evidence.

Mr. Rynder: I am trying to connect it up. The only way I can is by the testimony of a witness who knows the facts.

Exam. Carter: He has offered for identification the tariffs of these various stock yard companies, in which I assume there is some provision that under certain circumstances a yardage charge will not be assessed against the shipper.

Mr. Smith: Yes.

Mr. Rynder: That is right.

Exam. Carter: Now then, you are attempting to show by this testimony of the witness that the railroad serving that particular stock yard delivers the live stock, or you get delivery of the live stock at that point without any additional charge other than the line haul rate, is that not correct?

Mr. Rynder: Yes, sir.

Exam. Carter: I think it is material at this point. As [fol. 118] I say, I may entertain a motion later to strike it out. In other words, these tariffs are really an incidental thing, and I do not know whether they are so material, but what we have before us here is the railroads' action, or alleged action in causing the complainant to pay the yardage charge, if it does cause it to pay it. In other words, you have to pay an additional charge at Chicago.

Mr. Rynder: Yes.

Exam. Carter: And you do not have to pay it at certain other points.

Mr. Rynder: Yes.

Exam. Carter: Your theory is you should have delivery of your shipments without the payment of any additional charge at Chicago, other than the line haul charge.

Mr. Rynder: That is true, and part of my purpose the Examiner has stated exactly. Another part, and I say it with all due respect and reverence, is that in the Hygrade case the Supreme Court said—I think there was a line or two that so indicated—that this practice at Chicago was a universal practice. I have read the record in that Hygrade case carefully within the past week and I can find no evidence upon that point. That was the only record that went to the Supreme Court, so if that august tribunal made a

mistake of fact, I think, with all due respect, I have the right to try to show it.

[fol. 119] Exam. Carter: Very well. Proceed.

Mr. Rynder: I do not know where I was in the examination of the witness—oh yes.

By Mr. Rynder:

Q. I asked you what railroads deliver live stock at Baltimore?

A. The Baltimore & Ohio Railroad and the Pennsylvania Railroad, both defendants in this case.

Q. The Baltimore & Ohio Railroad and the Pennsylvania Railroad?

A. Yes.

Q. For the delivery of your shipments there, where you take immediate possession of them, is there any charge above the line haul transportation rate?

A. No, sir.

Q. Does page 1 of Exhibit No. 18, show how that is worked out through the stock yards tariff?

A. Yes, sir.

Q. Do you know whether the Buffalo stock yards at East Buffalo, New York, is a public stock yards within the terms of the Packers and Stock Yards Act?

A. Yes, sir, it is.

Q. I mean, it has been posted as such and it is contained in a list of railroad tariffs naming public stock yards?

A. Yes, sir, and it is so considered. You asked me whether I knew or not?

[fol. 120] Q. Yes. That live stock received by you at Buffalo—is it necessary for you to pay any charge above the line haul rate if the live stock is taken by your employes immediately from the unloading pens?

A. No, sir.

Q. Now, one further thing about Buffalo: is the Buffalo Stock Yards to your knowledge operated and owned, not through a subsidiary, but directly by one of the defendants in this case?

A. That is my understanding, yes. That fact is stated in the decision in Strauss & Adler versus the New York Central Railroad Company, 153 ICC 609, at page 612. It may be noted here that The New York Central Railroad Company allows at its own public stock yards at Buffalo delivery at the unloading chutes without any additional

charge, while denying similar treatment to Swift and Company at Chicago, and The New York Central Railroad Company is a defendant in this proceeding.

Q. Does the decision you mentioned state that the Buffalo Stock Yards at East Buffalo, New York is owned outright and operated by——

Mr. Smith: That is objected to as incompetent.

By Mr. Rynder:

Q. —The New York Central Railroad Company?

A. The decision so states, yes sir.

Exam. Carter: The decision is the best evidence, of [fol. 121] course.

Mr. Rynder: I think it is the best evidence we can get. It brings it to the point of requiring some rebuttal. When the Commission has heard a case, we have no right to go into the inter-corporate relationships of those other companies. However, if the Commission in one of its decisions states what they are, we have the right to assume it was correct at that time and that the condition exists unless and until it is shown to have been changed.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. Mr. Tally, do any of the defendants in this case make delivery of live stock through the Union Stock Yards Company of New Jersey at Benning, B. C.?

A. No. The provision for delivery of direct shipments of live stock at Benning B. C. is substantially the same as that stated at Buffalo, shown on page 3 of my Exhibit No. 18 and contained in Exhibit No. 7.

Q. You did not answer the first part of my question, as to whether any of the defendants here deliver live stock to that stock yards?

A. I do not know what railroad serves Benning. That is the reason I cannot answer the question directly Mr. Rynder.

Q. You do not know?

A. No.

Mr. Rynder: We will pass that up.

[fol. 122] By Mr. Rynder:

Q. Now, as to Cincinnati, do any of the defendants in this case deliver stock at Cincinnati?

A. Yes, sir.

Q. Please state who they are.

A. The Big Four Railroad, part of the New York Central System. The Pennsylvania Railroad; the Chicago, Indianapolis and Louisville Railway Company.

Q. Is any extra charge made by the carriers at Cincinnati above the line haul rates if the consignee takes direct delivery of the live stock at the unloading chutes?

Mr. Smith: Is there any additional charge made by whom? I did not get that, Mr. Rynder.

Exam. Carter: He says, is there any additional charge made—was that not it?

Mr. Rynder: Yes.

Exam. Carter: Read the question.

(Question read.)

Mr. Rynder: Change that; make it "by the carriers or any other party".

The Witness: No, providing the stock is driven out via Hopple Street exit.

By Mr. Rynder:

Q. Is that provision shown in your Exhibit No. 18, Mr. Tally?

A. Yes, sir.

Mr. Rynder: Off the record.

[fol. 123] Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

By Mr. Rynder:

Q. Mr. Tally, does your company operate a packing plant directly opposite the Cleveland Union Stock Yards at Cleveland, Ohio?

A. Yes.

Q. Does it receive direct shipments of live stock which it delivers through that stock yards?

A. Yes, sir.

Q. For such deliveries of live stock at Cleveland is any charge made by the carrier or by any other person above the line haul rate?

A. No, sir.

Q. Is there a provision in the tariff of the Cleveland Union Stock Yards Company which brings about that result?

A. Yes.

Q. Is that shown on some sheet of your Exhibit No. 18?

A. Yes, sir.

Q. Which one?

A. It is shown on page 5 of my exhibit No. 18.

Q. Does your company operate a packing plant and receive live stock in the City of Detroit, Michigan, through the Detroit Stock Yards?

A. Yes, sir.

[fol. 124] Q. Is any charge other than the line haul rate made for such deliveries at Detroit by the carrier or any other person?

A. No, sir.

Q. You obtain delivery of the live stock upon payment of the flat line haul rate through the Detroit Stock Yards?

A. Yes, sir.

Q. Is the provision of Exhibit No. 10 permitting that to be done shown on your Exhibit No. 18?

A. Yes, sir, at page 6.

Q. Have you any understanding of the ownership of the Detroit Stock Yards?

A. Yes, sir.

Q. What is it?

A. I understand it is owned by the Michigan Central Railroad, part of the New York Central System, who are defendants in this case.

Q. Is it an integral part of their railroad operations?

A. Yes, sir.

Q. Just while we are on that, where did you obtain that information?

A. I read a portion of the record before the Secretary of Agriculture in a proceeding entitled "In the Matter of Stock Yards at Detroit, Michigan", in which this fact was stated by counsel for the stock yards company.

Q. Was it so stated also in the report of the Secretary of [fol. 125] Agriculture in the same case?

A. Yes, sir.

Mr. Smith: I object to anything in connection with that except the official report of the Secretary of Agriculture to which I should not object and would not object, and I move that it be stricken.

Exam. Carter: I will sustain the objection. Strike it.

By Mr. Rynder:

Q. Mr. Tally, do certain of the line haul defendants in this case make deliveries of live stock at Indianapolis through the properties and facilities of The Belt Railroad and Stock Yards Company of Indianapolis?

A. Yes, sir.

Q. The tariff of that company is in evidence as your Exhibit No. 11?

A. Yes.

Q. Do you know whether for deliveries through the stock yards at Indianapolis there is any charge to the consignee over and above the line haul rate if he removes his live stock from the carriers' cars or loading pens immediately upon their arrival?

A. There is no charge other than the line haul transportation charge.

Q. Is a provision to that effect contained in your Exhibit No. 18?

[fol. 126] A. Yes, sir, on page 7.

Mr. Smith: Mr. Examiner, I do not think it is merely being captious to object to this line of testimony on the ground in each instance that counsel and the witness are going over these tariff provisions and paraphrasing them, and in some instances they are not using the same words used in the tariffs that are right before the Examiner. I object to it as not the best evidence, and as immaterial.

Mr. Rynder: Well, the best evidence of these tariffs would be the certified copies. I understood, Mr. Smith to waive that, although I said I could have it done within ten days.

Mr. Smith: I did not waive it at all, Mr. Rynder. You misunderstood me. I said I would not object if the certification were made promptly after the hearing and made part of the record. I would object to a certified copy being introduced within a short time after the hearing, on any ground of authenticity. I objected to the admission of the documents on the ground that they are immaterial to any issue in this case, because they tend to show nothing as to the

reasonableness or unreasonableness of the practice of the rail carriers, which are wholly unaffected by these tariffs filed with the Secretary of Agriculture.

Exam. Carter: Your particular objection at this time is to the, as you described, paraphrasing of certain tariff pro-
[fol. 127] visions included in this Exhibit No. 18 by the witness in his testimony?

Mr. Smith: That is my objection at the moment.

Mr. Rynder: What is on Exhibit 18 is no paraphrasing.

Exam. Carter: No. His objection was to the paraphrasing by the witness of the tariff provisions in the exhibit.

Mr. Smith: That is right.

Exam. Carter: That is what I understood his objection to be. In other words, he says "The tariff provision is there. Let it speak for itself". I think that is what Mr. Smith has in mind.

Mr. Rynder: All right. I would like to say—off the record.

Exam. Carter: Off the record, Mr. Reporter.

(Discussion outside the record.)

Exam. Carter: Now, back on the record.

By Mr. Rynder:

Q. Let us go back to the Los Angeles tariff, Exhibit No. 12. Do you operate a plant in Los Angeles?

A. Yes, sir.

Q. Do you receive live stock delivered through the Los Angeles Union Stock Yards Company?

A. Yes, sir.

Q. Is there any defendant in this case that makes its deliveries of live stock direct to that stock yards?

[fol. 128] A. Yes.

Q. What one?

A. The Atchison, Topeka and Santa Fe Railway Company.

Q. For such a delivery, where you take possession of the live stock promptly at the unloading chutes, do you pay any charge to the carrier or anyone else in excess of the carrier's line haul rates?

A. No, sir.

Q. What is the provision of the tariff covering that situation?

A. The provision of the tariff is that: "The following charges will be made on all live stock received at these yards:", and there follows the amounts that will be assessed on the different species of live stock. Underneath, there is the following exception: "On shipments of live stock not sold or weighed, yardage charges will be waived, except on horses consigned locally to these yards".

Q. Do your direct shipments come within the terms of the exception, that is, live stock not sold or weighed?

A. Yes, sir.

Mr. Smith: May I ask one question there?

Mr. Rynder: Yes.

By Mr. Smith:

Q. Is it your understanding under this tariff then that these shipments could be stored in the yard for a day or two and still they would not pay any yardage charge?

[fol. 129] Mr. Rynder: No.

By Mr. Smith:

Q. Or, is there some other provision that affects that? I am asking you Mr. Witness.

A. Under that language I would say we could hold it there indefinitely without a charge, provided it was not sold or weighed, but I do not know whether there is another provision in the tariff, without looking at it. There may be some other provision, but the closest I can come to that Mr. Smith is this: "All live stock arriving at these Yards is offered for delivery to consignees at unloading chutes. If consignee is not at unloading chutes to accept shipment, this Company will move stock to yarding pens at its earliest convenience". I take it then under those conditions that where they are yarded, the yardage charge will then apply, although it does not seem to be properly hooked up.

Q. There seems to be a conflict between the exception and what you just read, is there not?

A. (No answer.)

Q. Anyhow, you have referred to the other provision that you have——

A. I do not think there is a conflict. It is very definite here that when they are not there to take it, it will be subject to—or rather, it will be yarded in their facilities. But,

here it states that where shipments of live stock are not sold or weighed, yardage charges will be waived and they will [fol. 130] be subject to no provision—or, charge in the tariff then. It must be by inference.

By Mr. Rynder:

Q. Can you give a reasonable inference on that Mr. Tally?

A. What do you mean?

Q. What I mean to say is this: does not the usual yardage service involve weighing?

A. Yes, sir.

Q. And the exception of stock not yarded or weighed leaves practically only directs to be subject to the charge?

A. Yes.

Q. Is that not so?

A. Yes.

Q. I mean, subject to the exception?

A. Yes; not subject to the charge.

Q. Yes. Now, the next tariff to which I desire to call your attention is Exhibit No. 13, the Bourbon Stock Yards Company, Incorporated, Louisville, Kentucky.

A. Yes.

Q. Do you know whether that is the public stock yards of Louisville through which the line haul carriers generally make their deliveries?

A. Yes, it is.

Q. What is the fact in connection with the stock yards, as to whether there are any charges above the line haul trans- [fol. 131] portation rates where immediate possession is taken by the consignee upon arrival of the live stock?

A. No charge is made, as is provided for on——

Q. Where does that occur in your exhibit, in the tariff?

A. Page 9 of my exhibit, being an extract from the Bourbon Stock Yards Company Tariff No. 10, Item No. 1.

Q. But even though you paraphrase it a bit, the provision in substance is that there is no charge if delivery of live stock is made at the railroad unloading chutes or pens, but there is a charge if the consignee is not there to take the live stock?

Mr. Smith: That is objected to as immaterial. We are just killing time on this thing and fussing around with these provisions that are right before us, trying to paraphrase it and give the substance of it.

Exam. Carter: The provisions are there, and it really is not necessary for the witness to interpret those provisions unless they are uncertain, and then, even though it would be interpretation, it would be expert testimony.

By Mr. Rynder:

Q. Mr. Tally, are shipments of live stock delivered to Louisville to the consignees through the Bourbon Stock Yards Company by any of the defendants in this case?

A. Read that question please.

(Question read.)

A. Yes, sir.

[fol. 132] By Mr. Rynder:

Q. What ones?

A. The Monon Railroad; the Big Four Railroad; The Pennsylvania Railroad.

Q. I next call your attention to Exhibit No. 14, the schedule of The Muncie National Stock Yards at Muncie, Indiana.

A. Yes.

Q. Do any of the defendants in this case deliver live stock through that stock yards at Muncie?

A. I cannot answer that directly, Mr. Rynder. I cannot recall what railroads serve Muncie.

Q. All right. What provision of the tariff do you call particular attention — in this exhibit?

A. Section 1 of Muncie National Stock Yards Tariff No. 2, reproduced on page 11 of my Exhibit No. 18.

Q. I next call your attention to the West Philadelphia Stock Yards Tariff, Exhibit No. 15.

A. Yes.

Q. Is that the public stock yards of Philadelphia to which deliveries of a considerable portion of the live stock are made in that city?

A. Yes, sir.

Q. Do you pay anything above the line haul transportation rates for delivery at Philadelphia when you take immediate possession of the live stock?

A. No, sir, as indicated in Item 3 of West Philadelphia [fol. 133] Stock Yards Schedule No. 5, reproduced on page 12 of my Exhibit No. 18.

Q. I next call your attention to Pittsburgh Joint Stock Yards Company Tariff No. 16—or rather, Exhibit No. 16.

A. Yes.

Q. Is the Pittsburgh Joint Stock Yards Company a public stock yards in Pittsburgh?

A. Yes, sir.

Q. Is it there used by certain of the defendants here for the receipt and delivery of live stock at Pittsburgh?

A. Yes, sir.

Q. Who are those defendants?

A. The Pennsylvania Railroad; The Baltimore & Ohio Railroad.

Q. Is any charge made at Pittsburgh where the consignees take immediate possession of the live stock upon arrival at the unloading pens?

A. No, sir, nothing other than the line haul transportation charge.

Q. To what provision of the tariff do you call attention in that connection?

A. Section 1 of the Pittsburgh Joint Stock Yards Tariff No. 3, reproduced on page 13 of my Exhibit No. 18.

Q. Have you an understanding based upon authority of the ownership of that yard, Mr. Tally?

A. Yes.

[fol. 134] Mr. Smith: What was that question please?

Exam. Carter: Read the question, Mr. Reporter.

(Question read.)

A. It was testified in the hearing in Strauss and Adler versus the New York Central, 153 I. C. C. 609, that the Pittsburgh Joint Stock Yards is a separate corporation and its stock is owned jointly by the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company.

Mr. Smith: I move to strike that as not the best evidence.

Exam. Carter: I beg your pardon?

Mr. Smith: I move to strike that as not the best evidence.

Mr. Rynder: I am admitting it is not the best evidence, but that is no reason, necessarily, for striking it. That is stated in a report of the Commission: I think it constitutes at least a prima facie showing of that fact at that time, and if the facts have been changed since that time we would not be in possession of those facts. That should be shown by the defendants who are here and able to do it.

Exam. Carter: The witness testified, or he read into the record—he said it was from a particular report of the Commission; I guess the witness omitted part of what he intended to say there.

The Witness: It was included in the record—or, in the [fol. 135] report of the Commission in the Strauss and Adler case referred to.

By Exam. Carter:

Q. What is the citation of that?
A. 153 I. C. C. 609.
Q. That was stated as a fact in that report?
A. Yes, sir.
Q. Or, in that decision?
A. Yes.

Exam. Carter: I will over-rule the objection. It is evidence that that was the situation at that time. Proceed.

By Mr. Rynder:

Q. I would like to call your attention to Exhibit No. 17, the tariff of the Wichita Union Stock Yards Company.
A. Yes.
Q. Is the Wichita Union Stock Yards Company used by one of the defendants in this case for the delivery of direct shipments of live stock?
A. Yes, sir; The Santa Fe Railroad and the Rock Island Railroad.
Q. What charge if any above the line haul transportation rates is made for delivery of live stock through the Wichita Union Stock Yards, if the consignee is prepared to take immediate possession of it at the unloading pens?
A. No charge above the transportation charge.
Q. Have you quoted the provision to that effect in your [fol. 136] Exhibit No. 18?
A. That is page 14 of my Exhibit No. 18, a reproduction of item 17 of the Wichita Union Stock Yards Company Tariff No. 8.
Q. Now Mr. Tally, has the practice of direct shipments to Swift and Company at Chicago been a matter of rather recent development?
A. Yes. I have consulted our records and the men in charge of purchasing our live stock. I find that practically since the establishment of the Swift plant at the Chicago

stock yards up to 1927 all of the live stock for the Chicago plant was obtained by purchase of the live stock from commission men on The Union Stock Yard and Transit Company's property at Chicago. In 1927 Swift and Company commenced to make direct shipments to Chicago in comparatively small numbers. In 1929 the number of direct shipments had grown to be substantial in amount. I understand that the experience of the other Chicago packers has been substantially the same. Consequently the question of the charges which should be paid upon direct shipments did not become a matter of importance to Swift and Company until about 1929 and since that time, in one way or another, it has had the subject under discussion with the railroads and with The Union Stock Yard and Transit Company with a view to obtaining delivery of direct shipments in the manner which we are now seeking through this complaint. The [fol. 137] present practice of assessing a yardage charge upon all shipments delivered at the Union Stock Yards, Chicago, originated many years before direct shipments to that point had commenced. At certain other yards, as indicated in my exhibit 18, changes have been made to meet the present situation concerning direct shipments of live stock, but none has been made at Chicago.

Q. Are you advised as to the legal status of The Union Stock Yard and Transit Company of Chicago?

A. From various cases in which we have participated, and as a matter of common knowledge, I understand that The Union Stock Yard and Transit Company is an Illinois corporation which was chartered by the special act of the Legislature of the state of Illinois in 1865, for the purpose of conducting a public stock yards at Chicago and acting as the terminal for the railroads then entering Chicago in connection with the receipt and delivery of live stock. But I also understand that the Interstate Commerce Commission, in its decision in *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, has held that The Union Stock Yard and Transit Company of Chicago is a common carrier with respect to certain of its activities in connection with the receipt and delivery of live stock shipments by rail, so that it at present occupies the dual capacity of a public stock yards, filing tariffs with the Secretary of Agriculture for stock [fol. 138] yard services, and a common carrier, filing a tariff with the Interstate Commerce Commission in connection with the delivery of live stock.

Q. I observe that, in Swift and Company's letter of May 16, 1933 to the various carriers defendant in this case, it stated the following: "Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account and will be made purely in mitigation of damages." What course has been followed by Swift and Company in connection with the payment of these yardage charges since that time?

A. We receive bills almost daily from The Union Stock Yard and Transit Company for yardage charges upon direct shipments of live stock. All of these bills are aggregated and paid by Swift and Company by a check bearing the endorsement "Under Protest". The remittance slip which accompanies the check to The Union Stock Yard and Transit Company also bears the statement "Under protest". These bills from the stock yard company may cover a number of different cars arriving via different lines of railroad. After the bill of The Union Stock Yard and Transit Company has been paid, the yardage charges on each carload are segregated as to the line haul carrier into Chicago and monthly bills are rendered against each of the line haul carriers into Chicago for the amount of yardage charges which [fol. 139] have been paid to The Union Stock Yard and Transit Company on direct shipments arriving via the particular line haul carrier. This bill to the line haul carrier states the amount claimed and bears on its face a statement to the effect that it is for yardage paid to The Union Stock Yard and Transit Company of Chicago, under protest, for account of the railroad and in mitigation of damages. I have with me for examination, if desired, one complete set of the documents mentioned, including the bill from The Union Stock Yard and Transit Company and voucher in payment thereof.

Mr. Rynder: I would like to state here, Mr. Examiner, that we have one set of documents here for examination. We, of course, have them in our office for all of the shipments, but I have assumed that it would not be desired by the Examiner that we present a statement including all of these shipments and documents at this hearing, but that we withhold that, pending decision by the Commission as to whether

reparation should be awarded. However, so that the typical course followed may be available, we have one complete set of those documents here, but not to be filed as an exhibit.

Exam. Carter: Would you care to see it Mr. Smith?

Mr. Smith: Not at this time.

By Mr. Rynder:

Q. Will you please summarize what you are demanding in connection with the delivery of these direct shipments of live stock?

[fol. 140] A. All that we are demanding is that we be allowed an egress via the shortest route to a public street or to such other convenient point as may be designated by the carriers. We are not undertaking to designate the route to be followed or the point at which the live stock may be taken by us. We will accept any arrangement. In that respect it may be agreed upon by the carriers that we accept the live stock at such point as they may designate or remove it from the unloading pens by the use of our own employees over the shortest egress from the property of The Union Stock Yard and Transit Company.

Q. Under the demand that you are making in this complaint, would Swift and Company need or desire any holding pens of The Union Stock Yard and Transit Company in connection with the delivery of its direct shipments?

A. We would not. We have stated to the carriers in our correspondence, and we are still willing to have our own employes remove the live stock by such egress as may be designated by the carriers immediately upon unloading into the unloading pens, whether during the day or night.

Q. Would you desire or require the use of any overhead runways, alleys, or other facilities of the stock yard company, such as were apparently used by the Hygrade Packing Company in connection with its case involving yardage charges?

A. We would not except to the extent of using the short-
[fol. 141] est egress to a public street as might be designated by the line haul carrier.

Q. Would you use any of the scales of The Union Stock Yard and Transit Company for the purpose of obtaining weights on this live stock?

A. We would not. We have provided our own scale facilities and I understand that another witness will describe them more definitely. My information is that we would require no use of the scales of The Union Stock Yard and Transit Company of Chicago.

Q. Were the bills for yardage to which you have heretofore referred paid and borne by Swift and Company?

A. They were.

Q. Has Swift and Company ever been reimbursed by any other person, firm, or corporation for the yardage charges, as such, paid by it under protest?

A. It has not. As I have pointed out, we have attempted to obtain reimbursement from the line haul carriers, but in each instance they have refused to pay our bills so rendered against them.

Q. Mr. Tally, I desire to call your attention to certain matters in connection with the second paragraph of section 12 of the schedule of charges of the Union Stock Yard and Transit Company, No. 10, which has been offered in evidence as exhibit 3, and particularly that portion of section 12 [fol. 142] which reads as follows: "Inbound shipments: A charge of $3.00 per car, exclusive of the unloading charge will be assessed against and collected from each railroad delivering a car of live stock at the unloading platforms of this Company, as compensation to this Company for the service of counting the animals, notifying consignee of arrival, furnishing a list of dead and crippled animals to the railroads, furnishing weights on directs, collecting and remitting freight charges on such live stock and furnishing with respect thereto, as the railroads agent, such services and facilities as the railroad is required to furnish in making delivery of such live stock to consignee thereof." You will observe that the stock yard company provides a charge of $3.00 per car to be assessed against each delivering railroad, as the railroad's agent, for certain services, and I desire to inquire to what extent such services would have been or would be required in connection with direct shipments consigned to Swift and Company at the Union Stock Yards, Chicago, Illinois.

A. Yes.

Q. First, I want to ask you when that item first became effective?

A. March 2nd, 1935.

Mr. Smith: What tariff?

The Witness: Tariff No. 9 of the Union Stock Yard and Transit Company.

[fol. 143] Mr. Smith: What is it you said about that, please? May I have that question read?

(Record read.)

By Mr. Rynder:

Q. In other words, that section became effective more than two years prior to the filing of the complaint?

A. Yes, sir.

By Exam. Carter:

Q. Is that provision still in effect?

A. Yes, sir.

Q. You say that tariff provision still is in effect, Mr. Tally?

A. Yes, sir.

Mr. Rynder: It is in the one lying on your desk, Mr. Examiner.

Exam. Carter: I do not know. Somebody told me it was going to be cancelled sometime ago. Somebody came into the office and told me that. The tariff provision was going to be cancelled. I wondered if it is in effect.

The Witness: It is in effect today, yes, sir.

Mr. Smith: That is very interesting.

By Mr. Rynder:

Q. The first item named under that $3.00 charge is for counting the animals; is it necessary that this service be done by the stock yards?

A. In my judgment it is not. We make many shipments of live stock from points which are not public stock yards to [fol. 144] destinations which are not public stock yards as well as from public stock yards to destinations which are not public stock yards. The experience of my department has been that the carriers always keep a record showing the number of animals counted out of the car at destination in order to protect themselves against erroneous claims.

Mr. Smith: Mr. Examiner, we have devoted most of the afternoon to testimony that relates avowedly to the reason-

ableness of the charges which The Union Stock Yard and Transit Company files with the Secretary of Agriculture and makes against the shippers, and now this witness is endeavoring to go into the—as I take it—reasonableness of the charges which the Union Stock Yard and Transit Company files with the Secretary of Agriculture, which are directed at the railroad companies. This, like the other issue has been discussed all afternoon. I submit it has not anything to do with this case. I object to it as immaterial. I am interested in this provision. I have heard the author of it try to interpret it more or less unsuccessfully. I do not think it has anything to do with this case.

Mr. Rynder: I am sorry, but Mr. Smith has apparently been talking to someone else while I was putting in my testimony. I do not think I have put in a lot of testimony relating to the reasonableness, per se of any of these tariffs.

Mr. Smith: That is the only basis upon which the Exam-
[fol. 145] iner has considered it admissible.

Exam. Carter: As bearing upon the reasonableness of the practice.

Mr. Rynder: Oh no, Mr. Smith. I am dealing with the reasonableness of the practice. I am not suggesting whether 45 cents is reasonable as a yardage charge or 25 cents. My position has been to show in connection with the physical facts that there should not be any. In connection with this $3.00 item, I have no objection to the amount of it, and if the railroads want to hire somebody else to do that work for them, or if the stock yards wants to sell that labor to them, I have no objection. I am merely trying to point out the extent to which the items named therein are what, to the experience of the witness, he would consider transportation items or service ordinarily performed by railroads. I am not going to the reasonableness of this item.

Mr. Smith: There is a very strong difference of opinion, Mr. Examiner, as to the meaning and legal effect, if any, of that provision. I submit that the shipper has not anything to do with that issue.

Exam. Carter: I do not think this witness should be called upon to interpret those provisions.

Mr. Rynder: I am not asking him to.

Exam. Carter: What is the last question, Mr. Reporter?

Mr. Rynder: I asked him if counting the animals is a
[fol. 146] thing that the railroads ordinarily do as a com-

mon carrier, and he said "yes". That is no interpretation of that provision.

Exam. Carter: You may proceed further, and we will see what develops.

By Mr. Rynder:

Q. The next item stated here is, "notifying consignee of arrival". In connection with your shipments of live stock to other points—to Chicago, or other points in the United States, is that a service that is ordinarily given you by the railroad carrier?

A. Yes, sir.

Exam. Carter: With reference to this $3.00 charge, is that assessed against the shipper or the consignee?

Mr. Rynder: No; but I think it has a very important bearing as showing what could be added to the freight charge here in order to effect delivery. It is what the stock yards says they charge for that purpose.

Exam. Carter: I will let you go into it a little bit further, but I do not see its materiality in this proceeding. The shipper does not have to pay it in any event, the shipper or the consignee, I mean.

Mr. Rynder: No, but the stock yards if the Examiner will permit me to get to the end of this, says that for this $3.00, even though it is contended that a large part of it is transportation—for this $3.00 the stock yards is the railroad's [fol. 147] agent and will furnish such facilities as the railroad is required to furnish in making delivery of such live stock to the consignee. Now, if the Commission says that the carriers are required to make delivery to the consignee through egress to the nearest public street, or something of that kind, here is the stock yards statement of what it will cost the carrier, the maximum charge.

Exam. Carter: You may proceed.

Mr. Rynder: I am going to indeed suggest that as one measure of the basis of damages here.

By Mr. Rynder:

Q. The next item here Mr. Tally is "furnishing a list of dead and crippled animals to the railroads".

A. Yes.

Q. Do the carriers usually keep track of their dead and crippled animals at other points where live stock is received—that is, where you receive live stock?

A. They do.

Q. Without any additional charge?

A. Yes, sir.

Q. Do you understand that to be for the purpose of——

A. Protecting themselves entirely.

Q. —protecting themselves against erroneous and improper loss and damage claims?

A. Yes, sir.

Q. The next item covered by this charge is "furnishing [fol. 148] weights on directs". Is that necessary in connection with your direct shipments to the Union Stock Yards?

A. It is not. We have provided our own scale facilities upon our own property, and they are approved by the Western Weighing & Inspection Bureau. The location, and so forth, will be shown on a map by the following witness. During the period covered by our demands upon the railroads, as indicated in Exhibit No. 2, and at the present time, it has not been necessary to use the stock yard scales to obtain the weights of our direct shipments, and we do not desire to use the scales of The Union Stock Yard and Transit Company for that purpose.

Q. The next item contained in this statement is "collecting and remitting freight charges on such live stock". Is any stock yard service necessary or indeed performed in that connection upon your direct shipments to the Union Stock Yards, Chicago?

A. It is not. In fact, that service is not performed upon our direct shipments at present inasmuch as the freight bills are rendered to us by Mr. Kemp, the joint railroad agent at the stock yards, and our payment is made direct to him and is not made to the stock yards as appears to be the case in connection with shipments destined to commission men pens.

Q. I observe that the next item included within the $3.00 [fol. 149] charge is furnishing "as the railroad's agent, such services and facilities as the railroad is required to furnish in making delivery of such live stock to consignee thereof." If the Commission should hold that the delivery to be made by the railroads includes egress to the public streets, and if that were the delivery which the railroad is required to furnish, following the phraseology of section 12, would that $3.00 charge added to our freight rates,—or rather, if that $3.00 charge now assessed against the rail-

roads should be by the railroads in turn charged against us, would that make a substantially lower charge than the charge which you now have to pay as yardage?

A. Very much so.

Mr. Smith: That is objected to as immaterial.

The Witness: Very much lower.

Mr. Rynder: I do not think so. Pardon me. I think we have a direct sequence of events which carries right through. The carrier agent provides to get us out to the public street. We have our line haul carrier that brings a car to the Union Stock Yards. We have the Union Stock Yards as a common carrier under a tariff which it files with the Interstate Commerce Commission, and which it has tried to cancel, but the Commission has refused to permit it to cancel once. It is up again, I understand. But, the fact is, at present it is held still to be a common carrier by the Interstate Com-
[fol. 150] merce Commission and has been denied the right to withdraw that tariff from the Interstate Commerce Commission's file. So that tariff as a common carrier takes us the other step into the unloading pens. Then this third tariff I am referring to, published and filed with the Secretary of Agriculture says that for $3.00 we can get to the street—that is, through the carrier—and there again the stock yards is setting itself up not as a stock yards, but in the language of the section itself, "as railroads agent". Thereby, we have three common carrier provisions that entitle us to go to the street. So far they are regarding it as immaterial. I suppose Mr. Smith has tried to pass this over as if it were of no importance at all. I think it may be one of the most important things of the case, after the Examiner sees our briefs and sees our arguments.

Exam. Carter: I have seen that provision before.

Mr. Rynder: I will state in advance what I am trying to show. I am not asking you to decide the case at this moment, but, conceding that the railroad would have a right—or rather, the stock yards would have a right to publish this in its tariff, and to charge $3.00 for egress——

Exam. Carter: Is it your contention that does provide an egress? I have not looked at it recently.

Mr. Rynder: It says that this charge shall include this, and that, and the other, and then "such services and facili-
[fol. 151] ties as the railroad is required to furnish in making delivery of such livestock to the consignee thereof".

Now, the open question is, as I see it, "What is the railroad required to furnish in making delivery of such live stock?"

Mr. Smith: May I ask you a question?

Mr. Rynder: If it is required to furnish egress to the street, I should say this covers egress to the street, for it is whatever the railroad is required to do.

Mr. Smith: That is published by the Union Stock Yards.

Mr. Rynder: Yes.

Mr. Smith: The defendant carriers in this case do not for a moment concede that they should be bound by anything the Union Stock Yards does in a tariff filed with the Secretary of Agriculture.

Mr. Rynder: No.

Mr. Smith: I do not at all concede that that binds the rail carriers, until and unless they go to the Secretary of Agriculture and get it changed.

Mr. Rynder: I do not think they need go to the Secretary of Agriculture at all. I am simply suggesting that here is what it would cost for them to get to the street under the stock yards tariff. Now, in the portion which was going to follow, I was going to show it would be much cheaper for us if the railroad paid that $3.00 and in turn added it to our bill.

[fol. 152] Mr. Smith: Will you suggest to me how a charge covering transportation service can be published with the Secretary of Agriculture? You say this is transportation, to get these animals out to the street. How can that be covered by a tariff filed with the Secretary of Agriculture?

Mr. Rynder: I do not think I need argue that point with you.

Mr. Smith: I did not think you would. We do not need to. I do not think you are prepared to.

Mr. Rynder: I am plenty prepared to. I am prepared to show that is all it would cost the railroads to get our stuff to the street.

Mr. Smith: That is, assuming the tariff is a good tariff and actually makes that charge and that involves the question of whether a transportation charge, as you claim, can be filed with the Secretary of Agriculture.

Mr. Rynder: If you want to go back to that, we can argue for the afternoon.

Mr. Smith: You could not argue any more with me. I am through.

Mr. Rynder: Wait a minute. Since you brought this up, your railroads went over en masse to the Secretary of Agriculture and tried to get that item suspended, which he refused to suspend. You know that as well as I do.

Mr. Smith: I do not know that.

[fol. 153] Mr. Rynder: It is a fact.

Exam. Carter: Off the record, Mr. Reporter.

(Discussion outside the record.)

Exam. Carter: We will now adjourn until 10:00 o'clock tomorrow morning.

(Whereupon at 3:30 P. M. Central Standard Time, May 31, 1938, adjourned until 9:00 A. M. June 1, 1938, C. S. T.)

[fol. 154] Chicago, Illinois, June 1, 1938.
9 o'clock A. M. Central Standard Time.

Before: Paul O. Carter, Examiner, Interstate Commerce Commission

Hearing resumed pursuant to adjournment.

Appearances: As before.

Exam. Carter: Come to order please, gentlemen. At adjournment yesterday we were discussing the relevancy of section 12 of the Stock Yards Company Tariff No. 10 filed with the Secretary of Agriculture. As I understood Mr. Rynder one of the reasons why he considered that particular provision of section 12 relevant was in order to measure the damages. Is there any other reason that you have why you consider the particular provision relevant to the issues in this proceeding?

Mr. Rynder: There are several measures of damage, one of which will be stated by another witness, but frankly my position is, first, that we ought not to pay anything for what we are asking here; delivery ought to be made by the line haul carrier.

Mr. Smith: I am sorry, Mr. Rynder, but I cannot hear you. Mr. Reporter, read Mr. Rynder's statement.

Exam. Carter: His position is that he ought not to pay anything.

Mr. Rynder: As I say, my position is that we should not [fol. 155] pay anything. We are about to show how much

we had to pay exceeded this $3 charge. Second, if the Commission finds that the railroads would have to pay something in addition to what they pay to get us out of there, then here was the measure of what it would have to pay under that tariff, and the measure of the damages for the past, stated in a retreating position, so to speak—a second position—would be, as a measure of damages, or might well be, what we paid less $3.

Mr. Smith: Now, will you elaborate that a little bit by indicating how that theory which you have applied retroactively would apply prospectively?

Mr. Rynder: Yes. If the Commission thought that the carriers ought to be allowed something to pay for an exit, the carriers could publish on these directs, the Chicago rate plus $3, as a railroad tariff. Take that upon the basis that it is published in the stock yards tariff. It is as much of a statutory nature as a tariff published with the Interstate Commerce Commission. The provisions of the Packers and Stock Yards Act, relating to the publishing and filing of tariffs are substantially those of the Interstate Commerce Act, and are copied from it, so that for the present, at least, and during the entire period for which we have sought reparation, that provision has been in the tariff. Tariffs filed with the Secretary of Agriculture under that Act are subject to suspension, just as they are under the Interstate [fol. 156] Commerce Act. So, if the stock yards should undertake to change that charge the carriers may seek suspension, and would have every equity or right in doing it that shippers have in seeking suspension of the tariffs before the Interstate Commerce Commission. So, my answer to Mr. Smith's application as to the future is that if the Commission should not agree with my first position, but should accept the second, it could be fixed up very well for the future by these line haul carriers publishing a charge on direct shipments, of the rate to Chicago plus $3.

Mr. Smith: May I make one more inquiry along that line?

Mr. Rynder: That would not cost the carriers a cent, as I see it.

Mr. Smith: Mr. Rynder, addressing myself now to this theory that the Commission would say that $3 is a reasonable amount for the railroads to pay the yard company for the use of the yards facilities——

Mr. Rynder: I did not say "reasonable".

Mr. Smith: May I just go on?

Mr. Rynder: I did not say "Reasonable". I merely said it is the figure there.

Mr. Smith: Let me make my suggestion, and then you may make any reply to it you wish. As I understood you, your second thought was that if the Commission does not give you your preference by finding that you ought to have this service without paying anybody for it anything more [fol. 157] than you are paying now——

Mr. Rynder: You say "more than we are paying now." No. That is an error. We are paying now on cattle the line haul rate plus about $10.50 a car. We are paying on sheep the line haul plus $23 a car.

Mr. Smith: I mean, by paying more than you are paying now to the carriers.

Mr. Rynder: Oh.

Mr. Smith: I am trying to state what I understand your position to be, as the basis for a question I want to ask.

Mr. Rynder: Very well.

Mr. Smith: Your thought is that the Commission as an alternative might say the shipper should pay, on these directs—the shipper should pay the carrier a certain amount over the line haul rate, which for the purpose of illustration we will say is $3, and that that is a reasonable charge for the performance of this service or the use of these facilities. Now, is it your thought that the Commission has jurisdiction to require the yards company under the Interstate Commerce Act to permit the use of its facilities for that purpose, for the $3, or whatever other charge it might be?

Mr. Rynder: It is my contention that the Commission under the cases we are all familiar with and will doubtless mention in our briefs, has the right to require the carriers as a reasonable practice to allow us an egress to the nearest [fol. 158] public street. That answers part of your question.

Mr. Smith: Could you answer it a little more categorically than that? You say that the carriers ought to undertake to make an arrangement with the yards under which these facilities could be used, and then the railroads would make a certain charge against the shipper. We have been having a good deal of litigation with the stock yards company because we cannot agree with them on certain charges, and so far we have been able to find an arbiter in the Interstate Commerce Commission for those problems that have been

in litigation. Now, is it your position that the Interstate Commerce Commission also has jurisdiction to determine the measure of the charge which the railroads would pay the yards for that service for which they were then to charge the shipper?

Exam. Carter: Then, let me add this: and require the stock yards company to provide egress as a common carrier?

Mr. Rynder: No. The Commission here cannot make any order against the stock yards company.

Exam. Carter: It cannot in this case. It is not a party.

Mr. Rynder: I think even if it were a party, it could not do it. Now, the Commission has, however, made an order of exactly the type I am asking, in the Allied Packers case at New York, against the New York Central, requiring the carrier to furnish an egress without extra charge. The Supreme Court did the same thing prior to this in the Cov-
[fol. 159] ington Stock Yards case. I think that the Commission can order the carriers here to provide that we shall have an egress by the shortest route to the nearest public street and drop the order at that. I think that it is not my trouble if the railroads then have to negotiate with the yards.

Exam. Carter: Suppose it happened that the yards under no circumstances would agree with the railroads to provide an egress? What would be the alternative?

Mr. Rynder: Well, I do not think the yards could do that under its present tariff.

Mr. Smith: Which tariff, please?

Mr. Rynder: What?

Mr. Smith: Which tariff? The I. C. C. tariff?

Mr. Rynder: Section 12 of the tariff that is in evidence.

Exam. Carter: Tariff No. 12, filed with the Secretary of Agriculture.

Mr. Rynder: Yes. I do not think the yards could decline to do that under that present tariff.

Mr. Smith: Where would you proceed to enforce that, before the Secretary or before the Commission?

Mr. Rynder: I do not think that is my problem. I believe that if we are given an order here for such egress, that the carriers will proceed to provide it. This side talk as to how much it would cost them and so forth is really, in truth, as I see it, no part of my worries. I am just pointing out how
[fol. 160] they can do it.

Mr. Smith: You have not yet pointed out, Mr. Rynder,—if you are willing to pursue it for just a moment—how the carriers can command that this be done, or can fix the amount which the yards would do it for if the yards, one, refused to permit the use of its facilities for that purpose; and if the yards, two, refused to accept what the railroads think would be reasonable on your theory.

Mr. Rynder: I think that is the easiest question I have to answer. We have a perfect line for everything we want, between the railroad and stock yards as common carriers only. In the first place, we have the railroad that brings the stock in. Secondly, we have the stock yards as a common carrier providing for unloading. Thirdly, we have the stock yards as a common carrier, and as it states in section 12, holding itself out just as it does for loading and unloading, to perform this delivery service as defendant's agent, and to furnish such facilities and services as the carriers may be required to furnish. That last provision, as I see it, puts the stock yards as much in the position of being a common carrier as the loading and unloading charge, so that we get exactly all we want through the railroads up to a certain point, and through the stock yards holding itself out, not as a stock yards, but as a common carrier, for the other two items of unloading and delivery.

Mr. Smith: Mr. Rynder, you did not have enough confi-
[fol. 161] dence in that theory to join the stock yards as a party here, did you?

Exam. Carter: Let me ask you this: under your argument——

Mr. Rynder: The Supreme Court remarked in the Hygrade case that it was unnecessary—pardon me.

Exam. Carter: Under your argument as you just expressed it, if the stock yards company refused to allow this exit—take that first. If it refused to allow this exit, would the procedure then be for the railroads to file a complaint against the stock yards company, seeking an order requiring——

Mr. Rynder: I cannot go that far.

Exam. Carter: Well, I just want to get this clear in my own mind.

Mr. Rynder: I can not see how the stock yards can refuse to do something that in its published tariff it holds itself out to do. I cannot imagine the stock yards refusing to do something which in its published tariff it holds itself out

to do. It holds itself out as railroads agent to furnish such facilities as the railroad is required to furnish in making delivery of such livestock to the consignee thereof. Then, if the railroad by order of this Commission or by the decision of this Commission should be found to be required to furnish us egress to the street, the stock yards cannot deny the performance of a service it holds itself out to perform in a published tariff.

[fol. 162] Exam. Carter: Let me go just a little bit further. I am trying to clarify this in my own mind.

Mr. Rynder: All right.

Exam. Carter: Suppose the stock yards company did not refuse to provide an exit, but it did refuse to provide an exit except upon a charge which was unsatisfactory to the railroads. Let me ask you this question: do you then think that the Commission would have jurisdiction to determine the reasonableness of that charge? I am asking you that as a matter of information. I would like to get that clear in my own mind.

Mr. Rynder: If I follow that, first, so long as this tariff is in effect, the stock yards could not refuse to furnish the egress for $3. Now, you say, suppose the stock yards wants to impose a charge that the railroads deem to be unreasonable. The stock yards is here, and in one other instance, holding itself out as a common carrier. I say then that the Commission could determine the matter as a division.

Exam. Carter: That answers my question to some extent. Now, let me ask you this further question: at the present time, so far as the tariffs of the stock yards company are in effect, there is a charge against the railroads of $3.

Mr. Rynder: Yes.

Exam. Carter: For services which you contend include no more than delivery to which you are entitled on your direct shipments.

[fol. 163] Mr. Rynder: Yes.

Exam. Carter: They also assess a charge against you, a yardage charge.

Mr. Rynder: Yes.

Exam. Carter: Of so much per car.

Mr. Rynder: That is right.

Exam. Carter: Which you contend you should not pay because the services they render you and collect for under

this yardage charge are services which do not contemplate anything more than delivery of your shipments.

Mr. Rynder: Yes, sir.

Exam. Carter: Under the line haul rate.

Mr. Rynder: Yes.

Exam. Carter: So, we have this situation, that the yards company, for all practical purposes, so far as its tariffs are concerned, is assessing two charges, according to your contention, for the same service, one against the railroad and one against the shipper. Would that not follow? In other words, they are assessing two charges, one against the shipper and one against the carrier for the same service. I will go a little further. You have answered this question, somewhat, in your last answer. Do you think, then, that the Commission has the right to determine whether or not the stock yards company has the right to make these two charges for that particular service?

[fol. 164] Mr. Rynder: No. The theory of our case is this: I think the Commission has a right to determine that we should not have paid two charges and that the action taken by the railroads in this case, based upon the letters which Mr. Smith thinks are immaterial and self-serving, but which I believe are the main basis of our case—that the action of the carriers, after the notice given by us was a torfious conversion of our property; that the carriers thereby, by their tortious conversion of our property forced us to pay charges that would not have been paid except for that tortious conversion. Let me refer to exhibit 2. I point out to your Honor that this item (indicating) has been in effect since before our second demand on the railroads as shown in exhibit No. 2, and during the entire period for which we are seeking reparation. Give me a moment, please, to find the letter.

Exam. Carter: Surely.

Mr. Rynder: Here is the notice we gave the carriers in our letter, on page 187 of exhibit No. 2, which has never been modified by us. I have a letter before me addressed to Mr. W. C. Maxwell, of the Wabash. It was addressed to all of the other carriers shown in the exhibit. "As a matter of information, we furnish the Union Stock Yard and Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9, 1933, concerning shipments of livestock consigned to us at Union Stock Yards Station, Chicago, Illinois. Please take notice of the matters stated

[fol. 165] in its response to us, dated May 10, 1933, a copy of which is attached. You are hereby notified that on and after May 25, 1933, the Union Stock Yard and Transit Company of Chicago, Illinois, has no authority, after unloading such livestock as your agent, in accordance with its tariff''—and let me interpolate there; that tariff says ''as carrier's agent''—''to thereafter accept, or receipt for such livestock for us, as our agent, for our account, or in our name. On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yard and Transit Company of Chicago, Illinois, (other than delivery of such livestock through the Union Stock Yard & Transit Company of Chicago, Illinois, as your agent for unloading and delivery to us) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard and Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account, and will be made purely in mitigation of damages.''

Mr. Blanchard: Mr. Examiner, we put the carriers on notice at that time that hereafter any delivery forcing us to pay these yardage charges would constitute a conversion of our property. That is our position at the present time. The matter boils down to this—it does in our case, and I am sure it is the same as this one—that here was a carrier holding itself out to transport certain carloads of livestock between certain points and to deliver that [fol. 166] livestock to the consignee, in consideration of a line haul rate. They have not done it. What Mr. Rynder here seeks is an order against these carriers requiring that they do what they hold themselves out to do.

Exam. Carter: Will not the Commission have to ultimately determine in this case where the transportation ends?

Mr. Blanchard: I do not think the Commission's determination is going to be final. That is a matter the court is going to have to determine.

Exam. Carter: I mean, so far as the Commission is concerned.

Mr. Blanchard: Oh, I think it is a question.

Exam. Carter: Before it decides this proceeding it must determine where the transportation ends.

Mr. Blanchard: The question before the Commission is, can a carrier publish an ordinary line haul rate, engaging

to transport and deliver property to a consignee at a certain point, and then spot it in the middle of an island, knowing full well that the consignee has to hire a boat to come over and get it? I think that is the question, whether that is a delivery or not.

Mr. Smith: Mr. Rynder, do you care this morning to make any reply to the observation I made yesterday afternoon with reference to your reliance on this section 12 of the stock yards tariff, which you attach more importance to than I do? I would like to know what your theory is on that.

Mr. Rynder: That is what I have been stating all the time. [fol. 167] Mr. Smith: It seems to me you are attempting to ride a couple of horses in opposite directions on the thing. You say the tariff is one that will enable the railroads to require this service at a certain charge covering the getting of these animals out to a public street.

Mr. Rynder: Yes.

Mr. Smith: And that it does that because it covers that transportation service. You concede that the Secretary of Agriculture has jurisdiction limited strictly to stock yard services. So, how can that provision be at once a provision covering stock yard services of which the Secretary of Agriculture has jurisdiction, as he must if that provision has any validity, and at the same time cover transportation service?

Mr. Rynder: I did not suppose we would argue the case at this point.

Mr. Smith: I am not disposed to, but you have made a good many statements here, and I would like to have your comment on that.

Mr. Rynder: I might call your attention to this: the Secretary of Agriculture has not regarded that as a stock yards service. I would never bring forward the proposed report of an Examiner in an argument, but Mr. Smith has raised a question as to what the Secretary of Agriculture may hold. I do not know what he would hold. Let me call your attention to this fact: there is now pending before the [fol. 168] Secretary of Agriculture, B. A. I. Docket 472, which is a case involving all the rates and charges of the Union Stock Yards here, in a valuation of everything that goes into that kind of a case. This is merely the proposed report of the Examiner.

Mr. Smith: If you are going to comment from that——

Mr. Rynder: Wait a minute.

Mr. Smith: I want that in the record.

Mr. Rynder: Come up here, and we will both get it in the record.

Mr. Smith: I have a copy of the report. I know what is in it. I will make no objection to its admission here. However, I say, that if any part of that report is going to go into this record, it has to go in in the form of the best evidence, the report itself.

Mr. Rynder: Now, we are just arguing our points here. I am not in a position to furnish this entire report.

Mr. Smith: Then I object to any portion of it going in.

Mr. Rynder: I think since Mr. Smith asked me that question, I may, by showing the document to the Examiner and to Mr. Smith, call attention to a possible answer to his question. The reason I say I cannot put it in is because this is the only copy I have. The Secretary evidently issued only a few copies and our company and some other packers are intervening in it, on certain other grounds.

Exam. Carter: Do you have any objection, if the Commis-
[fol. 169] sion can obtain a copy of this report, to having it incorporated as part of this record?

Mr. Rynder: No. I would be glad to have that done.

Mr. Blanchard: I would object to just merely obtaining a copy of the report, unless there also be accepted the petition filed by these packers, wherein we pointed out what is wrong with the report, in certain respects.

Mr. Rynder: I wish you would withhold that just a moment, Mr. Blanchard.

Mr. Blanchard: I will withdraw it for the time being.

Exam. Carter: I think you may state in the record that there have been petitions filed by the stock yards company —or rather, you say, by the packers?

Mr. Blanchard: Yes.

Exam. Carter: To have the proceeding reopened, is that it?

Mr. Blanchard: Yes, reopened for further hearing on certain other grounds.

Exam. Carter: Is it understood, then, if the Commission can obtain a copy of this report, it may be incorporated as part of this record?

Mr. Blanchard: That would suit me.

Mr. Smith: I have no objection to it at all. It may show that the Secretary of Agriculture is in the process of determining the reasonableness of this yardage charge which these people say is a transportation charge. I do not object [fol. 170] to it being in the record.

Mr. Rynder: I had no thought of offering it. I simply brought this up because of the question Mr. Smith asked me. One reason I had no thought of offering it is, it is a proposed report of an Examiner, but since Mr. Smith has been pressing me for answers as to what the Secretary of Agriculture would do, I want to call attention to the fact that in this proposed report, this same section 12——

Mr. Smith: I still object to any excerpts being put in, unless the report as a whole is put in.

Mr. Rynder: This same section 12 is quoted at the bottom of pages 46 and 47. In connection with that, it is stated in this same report: "It will be observed that the respondent has on file with the Secretary of Agriculture a transportation charge listed amongst its stock yards charges. As a result of the changes brought about by the filing of amendment No. 3 to its tariff No. 9, and of the filing of tariff No. 10, and the amendments thereto, the respondent now assesses a charge upon all owners of incoming livestock and upon all owners of outgoing livestock purchased at its yards except on those who take the livestock to points within the city limits of Chicago." I wonder if Mr. Smith and I can agree that the statement commencing on page 76 refers to the footnote?

Mr. Smith: I have one or two thoughts in connection with that. First, if as you say the Secretary has found that that [fol. 171] is the transportation charge, it covers all of those various things the yards have been trying to collect $3 for and is not a publication of a stock yards service, and consequently has no place in the stock yards tariff, then it has not any more force than if it had been written on one of these appearance blanks and all of your conversation about it is utterly without basis. Secondly, did you find anything in the report in which the Examiner said this charge which the stock yards company makes against the packer for these directs is not a stock yards service, but a transportation service?

Mr. Rynder: The reason I mentioned that is because he has in a subsequent paragraph thrown out this $3 charge

on both income and expense accounts, as not being a stock yards charge.

Mr. Smith: Then he has thrown it out of the tariff. It has no force, is that right?

Mr. Rynder: No. He has not thrown it out of the tariff.

Exam. Carter: For the purpose of valuing the stock yards property, he has disallowed the $3 charge, is that right? Is that the effect of it?

Mr. Rynder: Yes. He has also disallowed the loading and unloading charge.

Exam. Carter: That is the $1.50 and $1.25?

Mr. Rynder: Yes; upon the ground that while the stock yards performs those services and owns those facilities——

[fol. 172] Mr. Blanchard: If I may interrupt, I would like to also add that he carefully refrains from imposing any stock yards charge for the service of the stock yards company in taking outbound shipments, storing them, holding them and loading them for outbound shipment. In other words, there is not anything in the report wherein the Examiner, Examiner Brooks suggests that the Secretary should prescribe any charge for a service which was a transportation service. Throughout the whole report, you will find he has carefully refrained from attempting to prescribe any charge for a service which is purely transportation.

Mr. Smith: With all due respect to Mr. Blanchard and Mr. Rynder, we do not accept any statement they make with reference to what is inside or outside of that report, and I move that every reference to it be stricken from the record unless the report itself is made part of the record.

Mr. Rynder: I am perfectly willing that the report be made part of the record if the Department of Agriculture will, as a matter of courtesy, furnish a copy to the Interstate Commerce Commission. I have no doubt they will do that. One principal reason I have for hesitating to put it in is that it never occurred to me it would even be mentioned in this case. It is no part of my proof. With all of the immense tables and everything in it, it is a tremendous job for us to copy it.

Exam. Carter: I will put it this way: the Commission [fol. 173] will make an effort to get a copy of this proposed report from the Secretary of Agriculture, and if it is successful in doing so the parties do not object to having it incorporated as part of the record.

Mr. Smith: That is right.

Mr. Rynder: Yes.

Exam. Carter: If it is not successful in getting a copy of that report from the Secretary of Agriculture, then your motion is, Mr. Smith, that Mr. Rynder's and Mr. Blanchard's remarks with respect to what is in that report be stricken, unless a copy of the report is furnished for the record. Is that right?

Mr. Smith: Yes.

Mr. Blanchard: I have not objected to it.

Mr. Smith: I would like to observe also that neither Mr. Rynder nor myself are under oath, as far as these comments are concerned.

Exam. Carter: I understand that.

Mr. Smith: It is purely the argument of counsel.

Exam. Carter: Then can we not settle the question in the manner I have stated?

Mr. Smith: It is perfectly satisfactory to me.

Mr. Rynder: It is satisfactory to me.

Exam. Carter: Very well.

Mr. Rynder: Permit me to show you the first page, Mr. [fol. 174] Examiner, so you may obtain sufficient information to enable you to know what to ask for.

Exam. Carter: That is what I wanted. I do not need to do it right now.

Mr. Rynder: No.

Exam. Carter: Are we ready to proceed?

Mr. Rynder: Now, I would like to further answer Mr. Smith's suggestion that granting everything that I have said about these tariffs and so forth, this is a mere piece of conversation and has no effect in this case. There have not been very many cases of this kind, of course, but it seems to me we have had a case that in itself suggests what the answer might be under the circumstances we have here, of a transportation service not being published in the tariff of a line haul carrier. Now, here are the facts, which can be verified by the decision in the case of Strauss and Adler versus the New York Central, 153 ICC 609,— that was one my witness cited yesterday as to certain ownership, and a rehearing in the same case, of which I do not have the citation here. Here were the facts in the Strauss and Adler case: Strauss and Adler brought a complaint and we intervened and were in substance a party complainant throughout it. There was published at the Pittsburgh Stock Yards,

at the New York Central Stock Yards what was called a service charge, and it was published only in the stock yards tariffs filed with the Secretary of Agriculture. We believed there was no ground for the charge at all, but we will pass [fol. 175] that. We lost on that. Anyway, as you will see by reading the opinion, that charge was solely for taking the livestock in transit out of the cars into the feeding pens, holding them in the feeding pens until they could be put back after a five or six hour period, and then removing them again over the stock yards facilities into the cars. It did not include the cost of feeding or watering in the pens, but as it developed in the case, was supposed to cover the use of the stock yards facilities to get the livestock to the unloading pens, the fact of holding them there and then returning them to the cars. That charge was published solely in the stock yards tariffs of the two stock yards I have mentioned. It was put on to our freight bills as an additional charge and collected from us at destination. We brought a complaint before the Interstate Commerce Commission upon two grounds, one, that the charge was not published in the tariffs of the line haul carriers from here to New York, or other eastern points; and, two, that so far as it had been collected it was an overcharge because not published in the tariffs of the line haul carriers. In its first decision—and I would like to emphasize in this case that at that time you had the situation you have here, of a transportation charge not contained in the tariff of a line haul carrier—but, in its first decision, the Commission held first, that the service was a transportation charge; that the carriers had violated section 6 and the tariff regulations [fol. 176] of the Interstate Commerce Commission by not publishing it in their tariffs and that under the Memphis case, which I think is back about volume 17, the Commission would afford another hearing to determine whether that charge had been unreasonable during the time that it was not published, but had to be paid by us, or was paid by us. Before the second decision the carriers published that charge in their own tariff, just as I suggest here they might publish this $3 charge. The Commission held a hearing and evidence was put in as to the cost of performing the service, and the value of the facilities used. The Commission held that the charge assessed in the past has not been unreasonable and declined to grant reparation, but it clearly dealt with the situation we have here of a transportation charge

published not in a railroad tariff; and it took jurisdiction of the matter and said it must be published in the railroad tariffs and after that first decision it was promptly and immediately published in the railroad tariffs.

Exam. Carter: I am ready to rule on the admissibility of the evidence which we have been discussing this morning.

Mr. Rynder: May I offer a suggestion as to just what I was to next introduce?

Exam. Carter: Yes. Go ahead.

Mr. Rynder: The witness had answered the question about section 12, and the only question following as to which an objection would go would be as to the difference between [fol. 177] that charge of $3 if assessed against us in the past, or if the Commission should assess it in the future, and the yardage we are actually forced to pay, which is the difference between that $3 charge—whether I am right or wrong about it—and what we did pay. That is all.

Mr. Smith: Mr. Examiner, I do not have anything to say further about the admissibility of that. With reference to that provision of the tariff, from my viewpoint, it is very clearly immaterial. I am not particularly concerned about what is done with it. I do think that Mr. Rynder is to be commended for his willingness to talk this thing out here on certain aspects of the case. It is an interesting problem, and if Mr. Rynder is willing, I would like to elicit his views on one further matter. I can do that after the Examiner has ruled, or before. It has not any relationship to the ruling you are going to make. It is simply something that would be helpful to have in the record.

Exam. Carter: You may do that now. I can rule later.

Mr. Smith: You have said, Mr. Rynder, and I fully recognize your preference is to have this service performed without any additional charge to Swift and Company.

Mr. Rynder: Surely.

Mr. Smith: In any amount.

Mr. Rynder: Yes.

Mr. Smith: You also, I think, with a good deal of candor [fol. 178] have undertaken to outline the suggestion as to how it should be handled in an alternative way by perhaps some determination of how the carrier could be compensated for doing the service for which it is not now compensated, and you spoke about the $3 charge being published and added to the line haul rate to give the carrier compensation. The question I want to ask is this: in view of that rather

broad-minded attitude, that I think is implicit in that theory of yours, does it not come to this: you have had an opportunity for years to go to the Secretary of Agriculture and thresh out before that tribunal what the reasonable measure is of the service that is performed for you by the yards on these directs. You have not done that, and now you are before the Commission attempting to work it out. Does it not really come to a question, from your viewpoint, as to whether or not that yardage charge now being assessed by the yards is a reasonable one, and you prefer to have that determined by the Interstate Commerce Commission rather than by the Secretary of Agriculture, who, as a matter of fact, is now in the very process of passing upon its reasonableness?

Mr. Rynder: No.

Mr. Blanchard: May I ask a question there?

Mr. Rynder: I would like to answer that.

Mr. Smith: Unless you think Mr. Rynder is not capable of answering it, Mr. Blanchard.

Mr. Blanchard: I would like to ask Mr. Smith what his [fol. 179] question is. I do not understand his question.

Mr. Smith: Perhaps the gentleman to whom the question was addressed does understand it.

Mr. Rynder: Mr. Blanchard, wait a moment please, so I may still have it in mind. It seemed to me that the inquiry was first, why didn't I go to the Secretary of Agriculture. The first answer to that is that the Secretary of Agriculture under the Packers and Stock Yards Act has no jurisdiction over transportation, from the very terms of the Act and by specific provision of the Act. I am sorry I do not have it with me, but it says in substance: "The jurisdiction hereby granted shall not in any way change, modify or reduce the jurisdiction of the Interstate Commerce Commission." Why didn't I go there? The Commission has taken jurisdiction of this very question in the Allied Packers case in New York. The Commission has taken jurisdiction of this question in the Kahn case at Cincinnati. The Commission has taken jurisdiction of this question in the Hygrade case at Chicago. We hope and believe we are bringing a different case from that of the Hygrade case. We believe we are in the right place, both on the statutory provisions and because of the cases that have been decided. Now, I come to the second part, as to whether we should go to the Secretary of Agriculture

to determine a reasonable charge for this delivery. We do not want the delivery contemplated in the stock yards tariff. We have been refused access to the street. We have been [fol. 180] told we could not obtain possession of our shipments without payment of the yardage charges and that means that what we have had to do is to take that livestock from holding pens of the stock yards company out runways designated by it to get it to our plant. I do not want to bring any complaint before the Secretary of Agriculture as to what the reasonable charge is for that service, if it is a service, that we do not want, and we have told the carriers they would be converting our property if they forced us into the possession of taking the service.

Mr. Smith: Can you not attack that before the Secretary of Agriculture as an unreasonable practice on the part of the stock yards?

Mr. Rynder: It could not be an unreasonable practice on the part of the stock yards. The stock yards has no jurisdiction over determining where transportation ends or what must be done in connection with transportation; and if that report happens to get into the record, you will find that that proposed report utterly disclaims such jurisdiction.

Mr. Smith: Mr. Rynder, I think Mr. Blanchard owes you an apology. I think you understood my question.

Exam. Carter: Are we ready to proceed?

Mr. Blanchard: I would like to have you answer this question: on what ground would we go to the Secretary and attack a charge assessed on shipments as to which not one stock yards service was performed?

[fol. 181] Exam. Carter: Now, gentlemen, I think I have heard sufficient argument this morning on what we have been discussing. I will allow that evidence to be introduced for the two reasons which Mr. Rynder stated, and it will be considered as admissible for those two reasons. You may proceed, Mr. Rynder.

G. F. Tally resumed, having been previously sworn, testified further as follows:

Direct examination (Cont'd).

By Mr. Rynder:

Q. Mr. Tally, the question I was about to ask you when objection was made, in substance was this: how would the

$3 charge which we have been discussing compare with the yardage charge which we have been forced to pay in order to obtain delivery of our directs? Please answer that question.

A. The $3 charge, even if added to complainant's freight bill on directs, would be much less than the amount now paid as yardage charges in order to obtain delivery of the directs. I have made a computation in this connection, the basis for which I will state. I have taken what are understood to be the average carloadings of the various species of livestock upon which the annual reports of the stock yard company showing carload equivalents are based. By that I mean that, in order to show the total number of carloads, the stock yard company has to use a so-called carload equivalent for shipments that come to the stock yards by truck. The basis which I have used, as to average loading, [fol. 182] is that stated by Mr. Henkle, vice-president and general manager of The Union Stock Yard and Transit Company, at page 4050, of the transcript of the testimony in Docket No. 472, a proceeding now pending before the Secretary of Agriculture. This basis of average carloadings appears on page 156, paragraph 259, of the proposed report of the Examiner in that case, and is as follows:

Mr. Smith: That is objected to as not the best evidence. Mr. Henkle is going to be here, and information of that type can be obtained from him.

Mr. Rynder: Let me ask you this:

By Mr. Rynder:

Q. You went to certain points to find out what are considered average loads at the stock yards?

A. Yes.

Q. Is your company there the recipient, and at other points in this eastern territory, the recipient of many thousands of carloads of livestock?

A. Yes, sir.

Q. Entirely apart from Mr. Henkle's testimony, and solely upon your own judgment, based upon years of experience, would you adopt the figures as to average carloadings which you are about to state?

A. Yes, sir. That is from practical experience, too.

Q. Do you know that the average is somewhere near, or somewhat close, to the figures that you are about to use?

[fol. 183] A. Yes, sir.

Mr. Rynder: Then may it be understood, Mr. Examiner, that Mr. Tally rests his computation upon his own estimate of average carloadings of livestock?

Exam. Carter: Yes.

By Mr. Rynder:

Q. Proceed, then, to state what you are using as your average number of livestock per car.

A. Cattle, 25 head per car; calves, 72 head per car; hogs, 90 head per car; sheep, 233 head per car. The yardage charges which we now pay in order to obtain delivery of our directs are: cattle, 45 cents per head; calves, 35 cents per head; hogs, 15 cents per head; and sheep, 10 cents per head. Using the average carloadings, as above indicated, and the yardage charges above stated, it will be observed that, in order to obtain delivery of our directs after they have been placed in unloading pens on the property of The Union Stock Yard and Transit Company, we pay an average of $11.25 per car on cattle; $25.20 per car on calves; $13.50 per car on hogs; and $23.30 per car on sheep. Consequently, even if this charge published by the U. S. Y. & T. Company to be assessed against the incoming carrier, were added to the freight bill upon direct shipments, it will be observed that the total charge would be from $8.25 per car on cattle to $20.30 per car on sheep, on the average, less than the present yardage charges we are forced to pay. It should be observed furthermore, from what I have previously stated, that a number of the items [fol. 184] for which this $3.00 charge is assessed are not items which I believe may be properly added to the freight charge, because they cover accounting and other matters generally performed by the railroads themselves, regardless of the destination of the livestock, and certain other items not necessary in connection with our inbound shipments of directs.

Q. Do the tariff items which you have mentioned provide for a delivery of direct shipments without the use of the stock yards company for any stock yard services?

A. Yes. U. S. Y. & T. Company tariff No. 9 I. C. C. 12, filed with the Interstate Commerce Commission, provides for the loading and unloading of livestock, and paragraph 12 of U. S. Y. & T. Company tariff No. 10, filed with the Secretary of Agriculture, provides for the $3.00 charge

above named "as railroad's agent" and not as a stock yards, for such services and facilities as the railroad is required to furnish in making delivery of such livestock to the consignee thereof.

Q. Was this rule in effect before your letter of September 9, 1935, addressed to the line haul carriers? I should have said, your letter of September 9, 1935, as appearing in exhibit No. 2.

A. The answer is "Yes".

Q. I observe that, in the carriers' reply of September 9, 1935, which are part of exhibit 2, they state that the demand is substantially similar to that which was made in 1933; [fol. 185] that the railroad company has no power or authority over the yardage charges published by The Union Stock Yard and Transit Company. Has there been any substantial change in the conditions since the letters of 1933?

A. In my opinion, there had been a substantial change. Since the demand made in 1933 the Union Stock Yard and Transit Company had published the rule which I have just described, second paragraph, section 12, U. S. Y. & T. Company tariff No. 10, in which it provided that it would furnish as "railroad's agent" such services and facilities as the railroad is required to furnish in making delivery of such livestock to the consignee thereof.

Q. Mr. Tally, I place before you the reporter's transcript of the hearing in Docket 24375, Hygrade Food Products Corporation versus the Santa Fe, covering the hearing of December 21st and 22nd, 1931, and at page 84 call your attention to the following question and answer:

"Q. Have you any scales in your place?

"A. We have no scales at our Chicago plant. We have a set of scales at Buffalo that is not in use, and it was packed up ready to move to Chicago."

Is your condition similar to that there stated for the Hygrade Company at its hearing in 1931?

A. No, sir. We have scales installed in our own facilities and are in a position to weigh the direct shipments of [fol. 186] livestock consigned to us.

Q. Now, I also call your attention for the purpose of asking whether your conditions are the same, to the following quotation from page 89 of the transcript in the Hygrade case, Docket No. 24375:

"Q. I know a hog from a cow, of course, but that is about all. Now, of the cattle that are delivered direct to you at the yards, you say there is about 15 per cent of them—that are consigned to you at the yards, I should say—you say there is about 15 per cent of them driven from the unloading chute direct to your plant?

"A. Yes, sir.

"Q. How do you get them to your plant?

"A. Through the alleys of the stock yards company.

"Q. Through——

"A. And through the high line, the high driveway.

"By Exam. Smith:

"Q. What do you mean by high driveway? An elevated driveway?

"A. Yes, sir, over the pens, away from traffic.

"Exam. Smith: I see.

"By Mr. Curran:

"Q. There is also a tunnel, is there not?

"A. There is a tunnel under the proposed Pershing Road.

"By Mr. Towner:

"Q. All of those facilities are the facilities of the yards company, are they not?

"A. I do not know who owns the tunnel.

[fol. 187] "Q. The rest of it?

"A. The rest are facilities of the stock yards company.

"Q. You use those facilities coming for livestock?

"A. Yes, sir.

"Q. That is true even in the case of the livestock that is driven from the unloading chute?

"A. Yes, sir.

"Q. Direct to your place?

"A. Yes, sir."

What I desire to ask you is whether Swift and Company has desired or required in the past or desires or requires in the future such use of the stock yards facilities as the Hygrade Company there stated it was making.

A. It does not. It merely seeks a right of egress from the stock yards designated by the carriers.

Q. Mr. Tally, did you lately make an inspection of the facilities that had to be used—or rather, that were used in reaching the Hygrade plant apparently as this business was done?

A. Yes, sir.

Q. Did it involve first, the use of alleys of the stock yards away from the unloading pens?

A. Yes, sir.

Q. Then did it involve the use of a high elevated wooden structure, commonly called out there a viaduct?

A. Yes, sir.

[fol. 188] Q. Then did that come down to the ground and go into a tunnel under Pershing Road?

A. *Yes, sir.*

Q. Is it your understanding that all of those facilities are stock yards facilities?

A. Yes, sir.

Q. Mr. Tally, I desire to call your attention to a letter in complainant's exhibit No. 2, and the portion thereof at the bottom of page 117, the letter being from Mr. J. B. Ford, vice-president of the Chicago & Eastern Illinois Railway Company, dated May 19, 1933, to Mr. O'Hara, Swift and Company, Union Stock Yards, and to similar statements in all letters bearing the same date from other carriers as shown in this exhibit.

A. Yes.

Q. The portion to which I desire to direct your attention at the bottom of page 117 of exhibit 2 is this: "Moreover, this company does not make delivery of livestock consigned to you to the Union Stock Yards and Transit Company of Chicago. On the contrary such deliveries are made by this company, in suitable pens at the Union Stock Yards at Chicago strictly in accordance with your instructions.'" Were any such instructions ever given by you?

A. Not to my knowledge, no, sir.

Q. Were your demands and instructions directly to the contrary?

A. Yes, sir.

[fol. 189] Q. Were they to the effect that we were demanding an egress to the street, and that a delivery to the Union Stock Yards and Transit Company would constitute a conversion of property?

A. Yes, sir.

Q. If the statement I have read to you there is a misstatement of fact in that letter, is it also a misstatement of fact in all of the letters which are exactly the same as to the content?

A. Yes, sir.

Q. Mr. Tally, I call your attention to the decision of the Commission in Docket No. 24847, at 219 I. C. C. 531.

A. Yes.

Q. Were you present at the hearings in that case?

A. Yes, sir.

Q. Were the facilities at Chicago for unloading livestock at the Union Stock Yards minutely described in that case?

A. They were.

Q. The point to which I desire to call your attention is—strike that. I call your attention to the statement appearing in that decision on page 541, reading as follows: "The Union Stock Yards are the only public livestock yards in Chicago and, with the exception of the plant of the intervener Omaha Packing Company, the only suitable place for the delivery of livestock." I want to ask you whether from your own information you can state whether the conditions as to places suitable for the delivery of livestock in Chicago have changed since the time of the hearing, or [fol. 190] the decision of the Commission to which I have referred.

A. They have not.

Exam. Carter: We will take a five minute recess.

(Short recess.)

Exam. Carter: Come to order please, gentlemen. You may proceed, Mr. Rynder.

By Mr. Rynder:

Q. Mr. Tally, since the demands of Swift and Company as indicated in the letters addressed to the carriers, which are part of exhibit 2, have the carriers ever designated any egress to the street by which Swift and Company could obtain delivery of its direct shipments?

A. They have not.

Q. Has it been necessary therefore for Swift and Company to follow the routes that it has followed in obtaining the delivery of its direct shipments?

A. Yes, sir.

Q. Just one other thing: certain stock yards tariffs were offered in evidence here yesterday. As to the question whether they are public stock yards, can you refer to any tariff of the railroad companies which lists all of the tariffs which are public stock yards, and which is on file with the Commission?

A. Yes, sir. In a tariff issued by L. E. Kipp, agent, I. C. C. A-2861, item 600, under the subject "Public stock yards, public livestock markets", there follows a very [fol. 191] elaborate list of points which includes such points as I referred to, such as Cincinnati, Cleveland, Buffalo, and so forth.

Mr. Smith: Since we have the tariff here, Mr. Examiner, can we not take it from the tariff, rather than having the witness——

Mr. Ryder: I think a reference to the tariff is enough. It is on file with the Commission.

Mr. Smith: May I inquire, does that purport to show all the public stock yards in the United States, or only those in a certain area?

Mr. Ryder: Suppose you show it to Mr. Smith, Mr. Tally.

Mr. Smith: I might not know if he showed it to me. He is an expert on tariffs. I do not read them very well.

By Mr. Smith:

Q. Can you answer that question?

A. I do not know whether it contains a list of all public livestock markets so considered in the United States, but, so considered by the railroads as public livestock markets.

Q. Throughout the United States?

A. Yes. That is a tariff issued by an agent for the Western railroads, the Western Trunk Line Committee, and it will be noted that they make reference to stock yards located at Buffalo, New York, not served by any of the members of the Western Trunk Lines for whom Mr. Kipp is agent.

Q. This tariff that you have referred to indicates on its face it became effective April 16th, 1938?

[fol. 192] A. This particular tariff became effective February 28th, 1938, but from my own knowledge, that same list is contained in the tariffs that were cancelled by this issue. I would be glad if it is important to have available

and make reference to such tariffs prior to this publication.

Mr. Smith: Mr. Examiner, as I understood it yesterday, you deferred ruling on the question of whether or not evidence as to the situation at other markets was admissible here, and before discussing further this list of stock yards, and before cross-examination of the witness with reference to the tariffs he discussed, and in order that I may arrange to offer such evidence as I may be able to on the question of the situation at other markets—I might say, parenthetically, I will be taken somewhat by surprise if it is admissible; but nevertheless, I will have some evidence to offer—for those reasons, I ask whether the Examiner would rule on the question at this time, and whether I might be heard on it for a moment before the ruling.

Exam. Carter: Yes.

Mr. Smith: Mr. Rynder offered these other tariffs as——

Exam. Carter: That is, the tariffs of the stock yards companies.

Mr. Smith: Mr. Rynder offered these tariffs of the other stock yards companies located at other points on the theory that they were relevant——

[fol. 193] Mr. Rynder: I offered more than the stock yards tariffs, if you are going to argue the point.

Mr. Smith: You also offered some excerpts from them, Mr. Rynder.

Mr. Rynder: I offered evidence that each one of these defendants did at certain points provide to make delivery without any extra charge.

Mr. Smith: We are talking about——

Mr. Rynder: I offered the stock yards tariffs in substantiation of my primary evidence.

Mr. Smith: We are talking about the same evidence.

Mr. Rynder: Except that you omitted the evidence as to the carriers.

Mr. Smith: You will not be bound by any inaccuracy in my statement on that, Mr. Rynder.

Exam. Carter: Proceed, Mr. Smith.

Mr. Smith: That evidence was offered, as I understood Mr. Rynder's theory, on the ground it bore upon the question of whether or not the railroad defendants in this proceeding were maintaining an improper rule, regulation or practice. The only specific violation of law which I find alleged in the complaint here is the allegation that there has been a failure to comply with paragraph 3 of section 1,

I suppose the theory being that we failed to complete the transportation service that is provided there. Now, if a railroad maintains a rate, or does clearly maintain a prac- [fol. 194] tice or rule that is asserted to be unreasonable under paragraph 3, or any other provision of section 1, I suppose a good deal can be said for the theory that the complainant was entitled to show what those carriers or other carriers were doing at other places in the level of rates they maintain, or in the rules of practice they maintained. That is not the question here. The essential question here is whether the assessment of this yardage charge which has been described here is in fact and in law a rule, regulation or practice of the carriers, or whether it is not. That depends, in turn, upon where transportation ends. If transportation ends when this livestock is put into these pens, these unloading pens at Chicago, then that is decisive of the question, because what is done thereafter by somebody else is not a rule, regulation or practice of the railroads, but by somebody else and it is not covered by this Act; so, from whatever viewpoint or whatever angle you approach this problem, you always arrive at the same end. The essential question here is the interpretation of paragraph 5, section 15, as to where transportation ends. I suggest to the Examiner, and I think it was the Examiner's view yesterday, that there has been a complete failure to connect these tariffs up with anything that the rail carriers anyplace have done or failed to do. I had anticipated there would be some effort to do that, but apparently there has been none, and apparently there is to be none. [fol. 195] I have looked at these tariffs, and perhaps the Examiner has, and I find this, that they differ from the tariff maintained by the Chicago yards in many respects. There is a different spread of the charges. I think we can accept it as a certain presumption, or a reasonable presumption that all of these yards undertake to obtain a fair return upon their property and upon their facilities—just as I take it the yards here does—but a comparison of these tariffs, one with another, will show that they spread those charges in a different way in order to get that fair return. I take it that none of them are using facilities which in the end they think they are not paid for. They do spread them differently. The point I am arguing is that the question of whether transportation ends at Chicago, or, indeed, ends any place when the livestock is unloaded into

these unloading pens, and the question of whether they are suitable pens, is not a question that can be determined, or upon which any light can be thrown by the information as to what stock yards located at some other points may do with reference to the division of their charges, as to whether or not they make a charge for this and do not make a charge for that, or what the measure of the charge is. As I see it, those two things are wholly unrelated. So, we say the question that is now before the Commission as to whether or not these railroads have fulfilled their full duty under the law when they have unloaded this livestock into what they call suitable pens at the stock yards, can- [fol. 196] not be determined by what stock yards companies at some other points may do with reference to that question. Essentially the problem, it seems to me, can be stated this way: Here we are not engaged in any determination of whether there is a reasonable rule or practice followed by the railroads, in this case. The essential question is where transportation ends, and that question cannot be influenced or affected by this evidence that is offered with reference to the situation at these other yards.

Exam. Carter: Mr. Rynder?

Mr. Rynder: First, I would like to say I do not agree with counsel, and I think we have a reasonable right to have our different theories go before the Commission, whatever the Commission may finally determine. I do not agree with counsel, that this case is to be determined under section 15, paragraph 5. I do not agree with counsel that the only violation of law alleged is paragraph 3 of section 1. We have alleged a violation of section 1 as a whole. Section 1 contains a definition of transportation which may or may not—as to livestock direct shipments—be limited by section 15, paragraph 5. The Commission so held in the Hygrade case. As I read the Supreme Court decision in that case, it did not reverse the Commission upon that ground, but upon the ground that the Commission was proposing to allow the Hygrade Company for the future, and to award reparation in the past, upon a basis of the Hy- [fol. 197] grade Company using not merely an egress to the nearest street, but all of the runways, overhead passes, tunnels, and so forth of the stock yards. In other words, the Commission was requiring the Hygrade Company there —or rather, the Commission was requiring the carriers to make a delivery in the Hygrade plant. That is at least the

way I read it. We will argue it in our briefs. The court said: "The Hygrade Company did not seek and the Commission did not grant relief upon the ground the carriers failed to provide egress from the unloading pens in the public stock yards to the city streets by means of which consignee's animals might be removed to its plant." It said further: "Plainly, there is an essential difference between the route from unloading pens to consignee's plant and the nearest way out to the public highways." It will be a question for argument here, naturally, upon all the cases before the Commission and upon this Hygrade case in the Supreme Court, as to the degree of transportation that must be furnished by the carrier in connection with these shipments. Now, coming to the particular tariffs the Commission had before it in 192 ICC 705, a somewhat similar proposition, and as I understand it, the stock yards tariff went in there, and is quoted in substance before the Commission. I happen to have a mimeographed copy, and on sheet 2 of that it says: "No additional charge is made for livestock removed by the consignees from the unloading pens before it is weighed," that being taken from the [fol. 198] stock yards tariff. Now, I do not know what arrangements the carriers have worked out at other points. I am not charging discrimination in that respect. I am simply attempting to show that they have, by some arrangement——

Mr. Smith: You have not shown that.

Mr. Rynder: The facts, the ultimate facts, will show that the carriers make no extra charge, and in order to make sure of that, I have to put in the tariff of the stock yards through which the live stock is delivered, because that extra charge is not published in the stock yards tariff. [fol. 199] Counsel could well say, if I did not put in those tariffs, "You have not proved but what at Cincinnati there is an extra charge of $10.00 a car". They simply substantiate the testimony of the witness that no extra charge is being made, and that fact can be substantiated from the railroad tariffs on file. For that reason I believe they are admissible. I assume the Commission will consider them for what they are worth, and if my theory of the case is wrong, will either give them no weight, or otherwise dispose of it. I do believe they should be in the case in order to prove the point that this rule about paying yardage charges on direct shipments is not a uni-

versal rule upon the part of the defendants in this case, or some of them.

Mr. Smith: Let me say just a word about that, Mr. Examiner. All that has been shown here is that the railroads at all these points, as far as this evidence shows, alike assess a flat rate to these yards, wherever they are, at these other points, just as they do here, the difference being that here the stock yards company under its tariff with the Secretary of Agriculture files a charge for yardage under certain circumstances and these other stock yards do not. I submit to you that that is wholly unconnected with any showing as to what the railroads are doing.

Mr. Rynder: Well, Mr. Examiner, if I had left the witness in this position, of testifying as to what the fact is, [fol. 200] that no additional charge is made at Buffalo, Cleveland, Philadelphia, Cincinnati, and so forth, counsel could have well said "Show me the tariff by which you can get out of there". It will not be in the railroad tariff, and the stock yards tariffs, as I see it, are no more than a substantiation of the statement of the witness that no extra charge is made at these points on these lines.

Exam. Carter: I am ready to rule. I think that the ultimate question here, or the real question that has to be decided first, is where the transportation ends. As I see it, that is the first question the Commission will have to decide. Now, if the transportation should end at a certain point, this question of what the practices of other stock yards were, would be of no importance. If the transportation ends at some different point, the question of whether or not the charges assessed at Chicago constituted an unlawful practice, and what the practices were at other stock yards would be relevant, except perhaps for this situation: these charges are imposed by the stock yards company and not by a railroad. My own personal opinion is that the evidence is not relevant to this issue. But, because of the importance of this case I will let it go in subject to Mr. Smith's objection and he may note an exception to my ruling. However, as I say, my personal opinion is I do not think it is relevant evidence to this particular issue. [fol. 201] (Complainants' Exhibits Nos. 5 to 18, both inclusive, Witness Tally, received in evidence.)

Mr. Blanchard: Mr. Examiner, may I be heard for one moment on this question of where transportation ends?

Mr. Rynder: Of course, Mr. Examiner, I accept your ruling, and do not think for a moment I am objecting to your statement in connection with it——

Exam. Carter: I understand that.

Mr. Rynder: —but, I again go back to my original proposition, that without these stock yards tariffs, I could not prove that live stock gets out at these various points, direct shipments, without an extra charge. I have offered it for that purpose, and no other.

Exam. Carter: I made my ruling as I did because there is a faint uncertainty in my own mind. As I said, I do not think it is material to the issues, but there is just enough uncertainty about it to cause me to rule as I have ruled.

Mr. Blanchard: If the Examiner please, I would like to be heard for just a moment on this question of where the transportation ends.

Mr. Rynder: Let me ask Mr. Smith a question. He has asked me a number of questions.

Mr. Smith: I can ask them much better than I can answer them. I will tell you that in advance.

Mr. Rynder: If I should agree to the striking of these [fol. 202] stock yards tariffs, will Mr. Smith agree that live stock is delivered by the carriers without extra charge to the consignee—I mean, if he takes it away from them as soon as it arrives—at the points I have named?

Exam. Carter: You mean, without any extra charge of any kind? Is that what you mean?

Mr. Rynder: Without any extra charge of any kind above the line haul rate. If he will do that, I will strike the tariffs now.

Mr. Smith: In other words, if I will agree with what you are attempting to prove by the submission of the tariffs, you could get along without the tariffs, is that it?

Mr. Rynder: Certainly.

Mr. Smith: I will not do it.

Mr. Rynder: I am on the horns of a dilemma. If I do not put in the tariffs you will say "No railroad tariff shows anything about what a man has to pay to get out" so, I put in the tariffs, and you say they should go out because they are stock yards tariffs.

Mr. Smith: You are quite wrong about that. I was objecting to any showing, whether by the tariffs or otherwise, with respect to the situation at other yards on the theory it throws no light upon where transportation ends at Chi-

cago. I would like to say this, Mr. Examiner, further: an exception may be noted to the Examiner's ruling. If the [fol. 203] Examiner does feel in the light of the statements he has made—or rather, if he does not feel like excluding this evidence notwithstanding his present view of it, I assume that the Examiner because of that attitude, to whatever extent it would exist, would like to have the situation depicted as fully as possible, with reference to the situation at the other yards. May it be understood that in attempting to develop some information on that subject, I shall not waive my objection to this evidence, and it shall be understood that it is going in in order to more nearly complete the picture, so that a more nearly complete picture may be had on the subject?

Exam. Carter: That will be so understood, yes.

Mr. Blanchard: Mr. Examiner, apart from the exhibits there has been a rather free use here of the expression that the main issue in this case is where transportation ends.

Exam. Carter: Well, so far as I was concerned, what I meant by my statement was that I felt confident the Commission would have to determine that question before they determine other questions in the case.

Mr. Blanchard: That was the point I had in mind. The complaint alleges a repeated performance of certain action by the carriers. Now, the placing in the position of this—in my opinion—agent, knowing that the agent will assess an extra charge as a condition precedent to completing the [fol. 204] transportation contract—I think perhaps in the interest of accuracy it would be better to say the question is, did these acts occur before transportation ended? In other words, if they occurred before transportation ended, it does not make any difference in this case whether transportation ended five minutes or ten hours afterwards. I make that observation merely in the interest of accuracy. I think Mr. Smith will accept that correction.

Mr. Smith: I am sorry. I would be unable to do that.

Mr. Blanchard: Well the complaint alleges the performance of an act. If that act took place before transportation ended it is within the jurisdiction of this Commission. When transportation ends, that is, the precise moment as to when it ends at each shipment is not relevant so long as it is determined that the end occurred after the acts alleged in this complaint had been done.

Exam. Carter: This last ruling I made was with particu-

lar reference to these tariffs. Now, as to the last question, I have forgotten what the last question and answer were, but they related to some other stock yards. What was that, do you recall?

Mr. Smith: He has a tariff which purports to show, as he thinks, probably with some reservation, a complete list of public stock yards. He was referring to certain yards shown there. I said if that were material to the case at all, [fol. 205] I thought that entire list ought to be shown.

Mr. Rynder: I simply intended as a matter of convenience to refer to the tariff.

Exam. Carter: Why do you give us a list of all public stock yards? What is the purpose of that?

Mr. Rynder: Simply to show they include those about which Mr. Tally testified.

Exam. Carter: I think it is understood, or I mean, the record shows that you do not say this is a complete list of all public stock yards as posted by the Secretary of Agriculture.

Mr. Rynder: No. It is simply that the long list that is there, which might not be complete, does include those about which Mr. Tally testified.

Mr. Smith: The important thing, from my viewpoint, is Mr. Examiner, that out of this long list of stock yards they have culled through their tariffs, and they have found relatively few which have different schedules of charges than does the Union Stock Yards at Chicago.

Exam. Carter: That is what I understood.

Mr. Smith: Of course, I am interested in showing that there is this large number of yards and that the tariff situation is different with respect to all of them.

Exam. Carter: You will be permitted to show that, with the reservation about your exception to the admissibility [fol. 206] of the original evidence.

Mr. Rynder: I would take it as a matter of course that Mr. Smith would be permitted to show that. Let me call your attention to the fact that Mr. Tally distinctly stated in his opening testimony that that was a fact.

Mr. Smith: That what was a fact?

Mr. Rynder: Well, perhaps I can find it.

Mr. Smith: You do not have to put it exactly. You have it in mind. State what the fact is.

Mr. Rynder: That at a great many of the public stock yards of the United States—I will name them if you want

me to, Kansas City, St. Joseph, Omaha, and some of the other major stock yards—the situation is the same as it is at Chicago.

Mr. Smith: Mr. Rynder, perhaps I would be relieved of offering a lot of testimony of this sort. You said yesterday, as I understood you, and perhaps inadvertently—or perhaps I misunderstood you—that at the great preponderance of these markets, with reference to the great preponderance of the stock—I do not know how you put it—that the stock yards tariff situation was different from that at Chicago. Did I understand you correctly, or did I misunderstand you?

Mr. Rynder: No; just a minute.

Mr. Smith: I think that occurred in some colloquy be-
[fol. 207] tween you and me.

Exam. Carter: Mr. Rynder, did you intend to convey that impression?

Mr. Rynder: Give me just a moment here, and I think I can show just what the witness said. Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: Mr. Rynder, you read, off the record a statement of the witness in which he referred to the charge which is made at Chicago by the Union Stock Yard and Transit Company on direct shipments in the form of a yardage charge, when those shipments are taken possession of by the consignee immediately upon their unloading into the unloading chutes. You pointed out that the witness stated that while that was the rule, there were important exceptions to that rule at various places in the United States. You have also referred to a number of public stock yards at which the stock yards company through tariffs filed by the Secretary of Agriculture does make a yardage charge on direct shipments, even though they are taken possession of at the unloading chutes, just as is done at Chicago. Are you willing to agree with the statement that the situation at Chicago in that regard does reflect what may be referred to broadly as the rule, and that at these one hundred or so stock yards you have pointed here to the exceptions to that rule?

[fol. 208] Mr. Rynder: Mr. Examiner, as to some one hundred or so stock yards I am not informed. I will say, according to my best information and belief, you cannot

get your live stock at Kansas City—I am just following some of the principal stock yards; I know about Omaha, St. Joseph, Sioux City and St. Paul—without paying a charge in addition to the line haul rate of the carrier.

Mr. Smith: Even where the stock is taken possession of immediately at the unloading chutes?

Mr. Rynder: That is true. But, I would like to point to this, that as a matter of principle we consider that rule as much in error as the rule which we are fighting here, and as a matter of factual difference, which may have been one reason why we have not considered these yards, the yards themselves to publish a much lower charge on live stock, direct shipments of live stock than their full yardage charge—but, it is a charge published in addition to the railroad rate and it is a charge which permits us at those yards to use all of their facilities, and in that respect it differs from Chicago, where we are asking for mere egress to the street.

Mr. Smith: Mr. Rynder, do you happen to know also what the situation is at such yards as San Francisco, Salt Lake City, Brighton, Ogden, and Seattle, for example?

Mr. Rynder: No, I do not.

[fol. 209] By Mr. Smith:

Q. Do you Mr. Tally?

A. No, I do not.

Mr. Rynder: I have had experience which leads me to know conditions along the Missouri River, and in St. Paul, but not on the Pacific Coast.

Exam. Carter: Do you have any further questions of this witness on direct examination, Mr. Rynder?

Mr. Rynder: No. Counsel may cross-examine.

Exam. Carter: Would you prefer to start now, or adjourn for lunch?

Mr. Smith: I have no preference, Mr. Examiner.

Exam. Carter: Very well. Proceed.

Cross-examination.

By Mr. Smith:

Q. What are your duties with Swift and Company, Mr. Tally?

A. I have supervision over the rate division of Swift and Company throughout the United States, handling cases

before the Interstate Commerce Commission, and handling matters before the various rate committees of the railroads in an effort to secure rates we think are necessary for the conduct of our business.

Q. That is sufficient.

A. All right.

Q. Has that been your work generally throughout the period you have been with Swift and Company?

A. Yes, sir; not in charge, but in that division. I have [fol. 210] been in charge for probably eight years.

Q. What was the job you held for a year with the yards company prior to your employment with Swift and Company?

A. I was not employed by the yards company, Mr. Smith. I was in the sheep business in the stock yards, which brought me in contact with the operation of the yards, and made me acquainted with the method of handling all live stock and the locations of the various alleys, runways and catch pens that they have.

Q. Were you with a sheep commission firm?

A. No. Unfortunately, I was with myself.

Q. You spoke about the discontinuance of the Hammond plant. What did you mean by that, please?

A. Well, the Hammond plant, a subsidiary of Swift and Company purchased live stock through our own employes, buyers on the stock yards market, and the stock was driven to that location and slaughtered and processed into edible products, and shipped therefrom.

Q. By Hammond and Company?

A. Under their name, yes, sir.

Q. Do you keep separate accounts for these subsidiaries?

A. I imagine they did; I do not know definitely. They kept their own records as to what they did and disposed of, yes.

Q. When did they discontinue that operation?

A. I do not think I could tell you, but I believe the next [fol. 211] witness can probably tell you that.

Mr. Rynder: I wonder if we can get it right now. Do you know, Mr. Reneker?

Mr. Reneker: September or October of 1934 or 1935; I am not sure which year.

Mr. Smith: Who is this speaking, please?

Mr. Rynder: The gentleman who just made that statement is Mr. W. T. Reneker, who will be my next witness.

Mr. Smith: Perhaps some of the questions I had in mind to ask Mr. Tally might more properly be asked of Mr. Reneker. What is Mr. Reneker's position with the company?

Mr. Rynder: Mr. Reneker is the head of the hog buying division of Swift and Company and is familiar with all the movements into the stock yards.

Mr. Smith: He is not any more familiar with the general business of Swift and Company, I take it, than is this witness.

Mr. Rynder: I think not. However, he is perhaps more familiar with the exact location of every pen, alley and so forth in the stock yards.

By Mr. Smith:

Q. What has the Hammond Company been doing since the change Mr. Reneker says occurred in 1934? What has been its business?

A. Well, as I understand it, there are some modified operations over there, but in a very limited way, not in the operation of a complete packing house. To the extent it is, [fol. 212] I am not fully acquainted.

Q. To the extent they are engaged in operations now, what kind of operations are they?

A. That is what I cannot explain Mr. Smith, the operations they are in. Mr. Reneker probably can explain that.

Mr. Reneker: No. That is the sales agency.

Exam. Carter: Now gentlemen, let us not have two witnesses testifying at the same time.

Mr. Reneker: Pardon me. I thought Mr. Rynder asked me to answer the questions.

Exam. Carter: I understand Mr. Reneker can answer that question.

Mr. Smith: All right.

By Mr. Smith:

Q. Does Hammond and Company receive any shipments of live stock consigned directly to it?

A. Not at the present time, no, sir.

Q. What do you mean by "the present time"? How far back do you go?

Mr. Rynder: I make the suggestion, if you do not mind at this time, that as Mr. Smith wants an answer to that question, before he takes the stand Mr. Reneker will telephone out to the office and find out exactly when the operations of that plant as a packing plant ceased.

Mr. Smith: I want to know a lot of things about the operation of your company, which I think are relevant to this [fol. 213] proceeding. I do not suppose you would want to call up with reference to each question.

Mr. Rynder. No, but if it is an important question—off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will recess at this time until a quarter of two.

(Whereupon at 11:15 A. M. C. S. T. adjourned until 12:45 P. M. C. S. T.)

Afternoon Session, 12:45 P. M. (C. S. T.)

Exam. Carter: Come to order gentlemen. You may proceed with your cross-examination Mr. Smith.

G. F. TALLY, previously sworn, resumed the stand and further testified as follows:

Cross-examination (continued).

By Mr. Smith:

Q. Now, the Hammond Company discontinued operations as a packing company about 1934?

A. That is what I understand, yes, sir.

Q. And since then they have not been engaged in the shipping or receipt of live stock or the slaughtering thereof?

A. There has been some slaughtering of cattle and sheep in a limited way.

Q. Is there now?

[fol. 214] A. I understand so, yes.

Q. Is that slaughtering done by the Hammond Company as a corporation, or is it done by Swift and Company in Hammond's plant?

A. Well, it is my understanding it is done in Swift and Company owned property, for Swift and Company.

Q. With reference to the animals that are slaughtered there, how are they billed? How are they consigned?

A. They are consigned to G. H. Hammond & Company.

Q. They are consigned——

A. Swift and Company, G. H. Hammond plant.

Q. They are consigned to Swift and Company, in care of the Hammond plant?

A. That is the identity of the location, Swift and Company, G. H. Hammond plant. Whether they are limited in their contract to G. H. Hammond & Company or Swift and Company, I am not familiar with, without looking up the actual documents.

Q. What is the business of the Omaha Packing Company?

A. The Omaha Packing Company since the plant burned down—I cannot tell you the year in which that burned down—their business is more the purchase and receipt of live stock. I understand they do make some sausage over there, but that is the extent of their operations, now, and has been since the plant burned down. I think that is two or three years ago, maybe longer.

[fol. 215] Q. Well, does the Omaha Packing Company slaughter animals there at its plant for the purpose of making sausage?

A. No, sir.

Q. Where are those animals slaughtered?

A. At Swift and Company's plant.

Q. Is the Omaha Packing Company—or rather, does it slaughter any animals at its plant now?

A. No, not to my knowledge.

Q. Where is the Omaha Packing Company plant?

A. 26th and Halsted Street.

Q. How far is that from Swift's plant, in the stock yards area?

A. Three or three and a half miles probably.

Q. Three or three and a half miles?

A. Yes, sir.

Q. What becomes of all this live stock which is unloaded at the Omaha Plant now?

A. It is trucked to the Swift and Company plant.

Q. Who is the consignee of that live stock?

A. Sometimes Swift and Company and sometimes the Omaha Packing Company.

Q. Well, why is the Omaha Packing Company shown as the consignee on any of them, if they do not slaughter?

A. There are some cases where shippers consign live stock to the Omaha Packing Company and it is there pur-
[fol. 216] chased on the basis of the market in Chicago at that time.

Q. Will you elaborate on that a little bit? I do not quite understand it.

A. Your producer in the country has not sold his live stock to the Omaha Packing Company. He consigns it to the Omaha Packing Company with the understanding that upon its arrival at that point they will purchase it on the basis of the Chicago market, both as to price, grade and so forth. At that time it then becomes the property of the Omaha Packing Company.

Q. Does the Omaha Packing Company slaughter that live stock?

A. No, sir. That is then transferred to the account of Swift and Company and trucked over to their facilities for slaughter.

Q. What is the volume of that character of business?

A. Well, I cannot give you the volume of it. It is a rather substantial amount, I believe. There is a pretty good bulk of traffic trucked from the Omaha Packing location to the Swift and Company plant.

Mr. Rynder: Let me interrupt you a moment there Mr. Smith.

Mr. Smith: Yes.

Mr. Rynder: I just want to ask Mr. Reneker if he does not have that? Do you have that, Mr. Reneker?

Mr. Reneker: Not in round figures, no.

Mr. Rynder: You do not?

[fol. 217] Mr. Reneker: It comes in different——

Mr. Rynder: May this be off the record please?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: Before the close of the hearing, will you please state for the record for the year 1937, if you find that to be a typical year, the percentage of the total receipts received by the Omaha Packing Company at its plant which are of the character the witness has just referred to, namely, live stock which is consigned to the Omaha Company in Chicago by shippers who have agreed to accept the Chicago price for that live stock?

Mr. Rynder: I do not know that we could furnish that percentage, because at the Omaha Plant the live stock comes in—we would have to look through one thousand contracts for that. Live stock comes in that has been bought in the country consigned to the Omaha plant and live stock comes in there consigned, as Mr. Tally has stated, but if the customer does not like the price he can move it on down to the stock yards. Live stock comes in by truck, and then—am I right Mr. Reneker?—all of it moves over to the Swift plant?

Mr. Reneker: We have made a few shipments of hogs out of there to eastern plants. All the rest of it does come to——

Mr. Rynder: The figures I was speaking of, I thought [fol. 218] were readily available, and would show the number of head of livestock by species brought in there and moved over to our plant at the Union Stock Yards. To break that down into different classes of contracts of purchase would involve an examination of every one of them and would be a big job.

Mr. Smith: By "moved over to the stock yards for purchase", you mean moved over to be sold on the yards?

Mr. Rynder: No; moved over to our plant there for slaughter.

Mr. Smith: Let me ask you this:

By Mr. Smith:

Q. Does this livestock come in under a contract executed by Swift and Company to pay a certain amount for it, or is it just sent in under a loose arrangement under which they will make a bid on it at the Omaha packing plant, and if the shipper does not like it, he will move it on down to the yards? What is the situation? I do not think the record is clear.

A. The method of handling, I think, is too practical for me to answer the question. I would prefer that someone with knowledge of the actual operations answer that question. I just know the general method of business down there. As to the form in which it is done, I am not acquainted with the facts as to that.

Mr. Smith: Mr. Rynder, are you saying you cannot advise us approximately how many cars in a given period, [fol. 219] or what percentage of the cars received by Omaha

Packing Company have been purchased by Swift and Company and at some place billed to Swift and Omaha—or, billed into Chicago?

Mr. Rynder: I am not saying that, because I think that would involve the examination of every contract involving livestock purchased at that place. In B. A. I. Docket 472, one of our men was subpoenaed and was asked and did furnish the number of head of livestock that, having come to the Omaha plant, were then brought over to our plant in the stock yards. That is a figure that has already been made up. As to the methods of purchase, we would have to examine each individual contract.

Stop the record, Mr. Reporter.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: May we go back on the record?

Exam. Carter: On the record.

Mr. Smith: We have a rather involved situation here, Mr. Examiner, factually. The record will show before we get through that in the last two years Swift and Company, the principal complainant, is practically receiving nothing at the Union Stock Yards, or very little, and now practically nothing; that the livestock which Swift and Company is slaughtering is being unloaded at the Omaha plant, which is also a complainant, and then trucked down to the Swift plant. This complaint involves directs as they are defined in the complaint moving to Swift and Com- [fol. 220] pany. I do not know what the purpose of the complainants will be, if they get the relief they seek here, but it appears that a large part—or some, at least, of those shipments going to the Omaha Packing Company are directs in the sense that they are shipped in here by Swift. I do not care whether it is much or whether it is little. I think the record ought to show how Swift and Company is getting its shipments, and all the information we can get about those shipments.

Exam. Carter: In other words, by your previous question you wanted to know not the exact percentage of this particular class of shipments, but you wanted to know whether it was approximately one-fifth, one-third or one-tenth?

Mr. Smith: Yes.

Exam. Carter: Roughly?

Mr. Smith: Yes.

Exam. Carter: You are not insisting that that be an accurate, exact figure?

Mr. Smith: No.

Exam. Carter: Mr. Rynder?

Mr. Rynder: Mr. Examiner, let me address myself to the relevancy of the thing for a moment. Everything I think that Mr. Smith has said is correct. I think that because of what we consider to be operation at the Union Stock Yards in derogation of our rights, we have abandoned the shipment of directs for the present moment to that yards, but it has been the practice, and we hope it [fol. 221] will be the practice again. We ourselves have found a way to beat it, but we still have a right to deliver livestock and we still have within the statutory period delivered livestock to the Union Stock Yards, and we have a right to do it again if we can do it under reasonable conditions. As I say, we have found out a way to beat the unreasonable condition. What happens to a shipment coming to the Omaha Packing Company, unloaded on the private facilities of Swift and Company and in Swift and Company's private truck, carried to Swift and Company's plant, not in Union Stock Yards property, has nothing to do with this case.

Mr. Smith: This whole case has to do with direct shipments.

Mr. Rynder: Direct shipments to the Union Stock Yards.

Mr. Smith: Well, Mr. Rynder, perhaps we can make progress this way; if those shipments unloaded at the Omaha Packing Plant were unloaded at the stock yards, would you regard them as directs, then?

Mr. Rynder: I say, if they were unloaded at the stock yards, we would have to pay a yardage charge to get out.

Mr. Smith: They are consigned to Swift?

Mr. Rynder: Yes.

Mr. Smith: And regardless of this question of title, they are direct shipments to Swift?

Mr. Rynder: Yes; I would say so, consigned to the Omaha Packing Company, which is a wholly owned sub- [fol. 222] sidiary of Swift and Company. But, they do not come to the Union Stock Yards, nor in the course of their transportation to our plants do they use any facility of the Union Stock Yards.

Mr. Smith: Can you illustrate for us a little more specifically the circumstances under which those shipments come in, as to what the understanding is between Swift and Company and the producer who ships them, as to whether or not there is any memorandum in writing or anything of that sort?

Mr. Rynder: If you want to take my word for it——

Mr. Smith: I meant to ask the witness, but I will be glad if you can answer it.

Mr. Rynder: If you want to take my word for it, I will certainly try to be honest in the answer I give. There are two classes of transactions. There is one where a buyer of ours purchases livestock at another point, let us say in the country, or perhaps on the Kansas City market. It becomes our p[illegible]operty at that time, and is billed to the Omaha Packing C[illegible]mpany at Chicago, Illinois. There is a case where we [illegible]e the owner of the property during the transportation. The other case, omitting truck shipments which are not involved here, is where we have solicited business from country shippers, and they take the risk that they will be able to find at the Omaha plant a satisfactory sale.

Mr. Smith: Satisfactory what?

Mr. Rynder: Sale.

[fol. 223] Mr. Smith: I see.

Mr. Rynder: At that time we are not the owner of the property in transit. They consign it to the Omaha Packing Company, Chicago, Illinois. Their men and our buyer there judge the hogs, and know what the quotation is on them, and I would say in most instances they come to an agreement as to what should be paid.

Mr. Smith: That is what I was going to inquire into. As a practical matter, is the sale consummated under those circumstances generally?

Mr. Rynder: It is consummated both ways. That is why I would have to say we would have to examine our contracts.

Mr. Smith: I did not mean that, Mr. Rynder. You said usually they do agree; I mean, where the stuff is billed in, under those circumstances as a matter of fact and of practice, does it work out that an agreement is reached and Swift and Company takes the traffic?

Mr. Rynder: I should think in 99 per cent of the cases that would be true.

Mr. Smith: I see.

Mr. Rynder: In other words, if the men were dissatisfied with the price or grade, they would put them on a truck and move them down to the Union Stock Yards. That does not very often happen.

Mr. Smith: I am perfectly willing to accept your state-
[fol. 224] ment, and if you could, I think you should give us the best information you can as to what part of the volume is handled that way and what part of it is purchased by Swift at another plant, or in the country, just roughly. How would that divide?

Exam. Carter: What proportion is owned by Swift when it arrives at the Omaha plant.

Mr. Smith: That is right.

Exam. Carter: And what proportion is not.

Mr. Smith: That is right.

Exam. Carter: Roughly.

Mr. Rynder: Just a minute. Do you know whether that information could be obtained, Mr. Reneker, without a considerable amount of work?

Mr. Reneker: It would involve considerable figures, because we have both truck deliveries, car deliveries and direct deliveries. It would have to be broken down.

Mr. Smith: Is it conceivable that somebody with Swift and Company or the Omaha Packing Company does not know just offhand how those things divide?

Mr. Rynder: I think we can give you the information, but it would involve the examination of thousands of contracts. Is it not sufficient if I stipulate with you that a substantial amount reach there under both conditions? That is the truth.

Exam. Carter: Is there not somebody at the Omaha plant who is familiar with the transactions which go on there, who
[fol. 225] would be able to say, "Well, now, 70 per cent"—I do not mean that that would be the figure—but is there not somebody who could say, "Three-fourths, one-fourth, or one-fifth comes to us on consignment and the remainder is owned by Swift when it arrives at the Omaha plant"?

Mr. Smith: Does not somebody know whether it is 5 per cent of this stuff that comes in, as to which somebody has to dicker on the price, and the other 95 per cent they do not have to? I should think that would just seep in.

Mr. Rynder: All I have on that is Mr. Reneker. He is our chief hog buyer, and I can only ask him if that can be

obtained. This can be off the record, as far as I am concerned. I find that Mr. Reneker will be able to give that in an approximate percentage.

Exam. Carter: I did not mean in any exact amount.

Mr. Rynder: I find out now that we can give what you suggest.

Exam. Carter: Mr. Smith has stepped out of the room for a moment, so you had better wait. Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. You are not interested, Mr. Smith, in what proportion of the shipments are received at the Omaha Packing Company plant on consignment by trucks, are you?

Mr. Smith: No, not by truck.

[fol. 226] Exam. Carter: Mr. Smith, as I understand it, wants to know what proportion of the rail shipments received at the Omaha Packing Company plant are received there on consignment, is that right?

Mr. Smith: Yes. That is right.

Exam. Carter: Mr. Rynder did say, while you were out of the room, that—will you state what you said, Mr. Rynder?

Mr. Rynder: This can be off the record, can it not?

Exam. Carter: Yes. Off the record.

(Discussion outside the record.)

Exam. Carter: Now, let us go back on the record. I will swear Mr. Reneker at this time.

(Mr. Reneker was thereupon duly sworn.)

Mr. Smith: Will you state, Mr. Reneker, what percentage of the——

Mr. Rynder: You are addressing Mr. Reneker now?

Mr. Smith: I said. "Mr. Reneker".

Mr. Rynder: All right.

Mr. Smith: Mr. Reneker, Will you state what percentage of the consignments to the Omaha Packing Company plant come in on consignment, so-called, and what percentage of them are purchased by Swift and Company either in the country or at other plants and come in as Swift and Company shipments?

Mr. Reneker: Well, I would say, as I answered before,—I thought I was answering that, Mr. Smith—approximately

[fol. 227] 40 per cent of our receipts are shipped direct by our own agents or corporation, to the Omaha Packing Company.

Exam. Carter: Of your rail receipts?

Mr. Reneker: Of the rail receipts. I am not speaking of trucks at all.

Mr. Smith: Read Mr. Reneker's statement to me please, Mr. Reporter.

(The record was read.)

By Mr. Smith:

Q. Well, now, this is Swift traffic, is it not, in the sense that Swift acquires title to it either in the country or in Chicago, and slaughters it in its own plant?

A. Yes, sir.

Q. That is true with reference to all of the livestock coming into the Omaha packing plant?

A. Yes, sir.

Q. How does the proportion of the various species run in the livestock that Swift receives?

A. I do not know the proportion, but I think the preponderance of it is hogs.

Q. Would you be able to give the percentage?

A. No, sir.

Q. Are there some cattle?

A. Yes.

Q. Are there some sheep?

A. Yes, sir.

[fol. 228] Mr. Smith: Does Mr. Reneker have that information?

Mr. Reneker: No. I would not be able to break it down for you, Mr. Smith.

Mr. Smith: Does the proportion run about the same as between trucks and rail shipments?

Mr. Reneker: Are you asking of the different species?

Mr. Smith: Yes.

Mr. Reneker: No. The greater part of our truck receipts are hogs.

By Mr. Smith:

Q. Mr. Tally, what streets are the nearest public streets that you refer to in your complaint?

A. You mean in the stock yards?

Q. Yes—well, outside of the stock yards. Say you want egress to the nearest public streets. What are those nearest public streets?

A. Well, that depends on where the livestock is unloaded. The unloading facilities of the railroads extend pretty nearly three-quarters of a mile; in some cases Halsted Street might be the closest; in other cases Laurel Street might be the closest. In other cases—at the west end of the yards there is a street known as Packers Avenue.

Q. Are Laurel Street and Packers Avenue public streets?

A. Laurel Street in and of itself is a street of the stock yards, but it leads on to a public street.

Q. What public street does it lead on to?

[fol. 229] A. It leads on to—it is really an extension of Morgan Street. Inside of the yards it is known as Laurel Avenue. When it gets out of the yards property it is known as Morgan Street. That also crosses Pershing Road.

Mr. Rynder: Just to clarify this, let me ask you this:

By Mr. Rynder:

Q. Is Morgan Street a north and south street?

A. Yes.

Q. Crossing Pershing Road?

A. Yes. It comes up and——

Q. And terminates at——

A. —and terminates at Pershing Road; Laurel Street starts on the other side of Pershing Road.

Q. Running south?

A. Yes, into the Exchange building.

Mr. Rynder: I just wanted to get that clear.

By Mr. Smith:

Q. So, the nearest street in some instances might be the intersection of Morgan and 39th Street, or Pershing Road?

A. Yes, sir.

Q. With reference to certain shipments.

A. Yes.

Q. Is that your testimony?

A. Certain shipments that might be unloaded at certain locations, yes.

Q. With reference to others, what would the nearest [fol. 230] public street be?

A. There are facilities for reaching Emerald Avenue—yes, Emerald Avenue, just east of Halsted Street.

Q. Just east of Halsted Street?

A. Yes.

Q. How could a street east of Halsted Street be the nearest public street to the unloading docks? I think perhaps I am a little confused about that.

A. Where the stock is unloaded at the north end of the stock yards, going east, the runways are overhead, over Halsted Street by a viaduct, and lead down into alleys that lead out into Emerald Street.

Q. Who owns those alleys?

A. They are used by packers——

Q. Are they public alleys?

A. They are used by packers located in that section to get their livestock out into the streets.

Q. If you do not know who owns them, just say so.

A. I do not know who owns them. I would not say definitely.

Q. Who owns that overhead viaduct over Halsted Street?

A. I do not know that definitely. I understood it was the stock yards property.

Mr. Rynder: The viaduct over Halsted Street?

Mr. Smith: The nearest public street——

The Witness: Yes, sir.

[fol. 231] Mr. Smith: May I go ahead, please?

Mr. Rynder: Yes.

By Mr. Smith:

Q. The nearest public street with reference to certain shipments unloaded in certain parts of the yards would be Emerald Avenue, reached over this overhead viaduct across Halsted Street?

A. Yes.

Q. Is that your statement?

A. Yes, sir.

Q. Where would they go from this overhead viaduct?

A. From the alleys of the stock yards company that lead right into this overhead viaduct.

Q. How long is that viaduct?

A. A little more than the width of Halsted Street, I believe.

Q. Where does it cross Halsted Street?

A. At approximately 40th Street I should say.

Q. Where is the outlet from that viaduct, some place between Halsted Street and Emerald Avenue?

A. No. The outlet is on Emerald.

Q. It is on Emerald?

A. Yes.

Q. How far is Emerald from Halsted?

A. Two blocks.

Q. I thought you said the viaduct was just——

A. I guess it is one block.

[fol. 232] Q. One block?

A. From Halsted to Emerald, yes.

Q. I thought you said the viaduct was just long enough to cross Halsted Street there.

A. The viaduct is at the—goes back down on the ground, and there are alleys on the level of the ground, after that.

Q. I asked you where the outlet of the viaduct was east of Halsted Street. Where is it?

A. The outlet is Emerald Street, on the level of the street.

Q. Where does the viaduct itself end?

A. The viaduct ends on the east side of Halsted Street and then goes down a runway to the level of the ground where there are alleys that extend over to Emerald Avenue.

Q. Can you point out the approximate location of that on exhibit 1?

A. They come up at the east end of platforms 2 and 3 and extend out. It is not shown on this map.

Q. You pointed to the east end of unloading platforms 2 and 4, did you not?

A. Yes, sir.

Q. Where does the viaduct start, right at the end of those unloading platforms?

A. No. There is a little entrance way—it may not be over 75 feet.

Q. Is that on the ground?

[fol. 233] A. That is on the ground, yes.

Q. Yes.

A. Then there is an incline up over the viaduct.

Q. Now, you have named two of the nearest streets that the complaint contemplates. You spoke about others. Where are the others?

A. Well, there is one other one on the west end of the stock yards property. It is not as desirable a delivery into a street as the other two mentioned.

Q. But it would be the nearest with respect to some shipments?

A. Yes, sir.

Q. What is the route to that nearest street with reference to those deliveries?

A. Well, it would be down alleys Nos. 3, and—I am not just sure whether 1 runs into that or not, but I feel sure 3 is the one that will lead into that outlet.

Q. Well, now, you are in the process of giving the egress to the nearest public street from certain unloading chutes. What are those unloading chutes?

A. Unloading off of platform 1 and platform 3 to the outlet I have just described, on the west end.

Q. That outlet is finally to what public street?

A. To Packers Avenue.

Q. Is Packers Avenue a public street?

A. Well, it is used as a public street. Everybody uses it.

[fol. 234] Q. Is it a public street?

A. I do not know, of my own knowledge. I go down it. Trucks go down it. Anybody else goes down it. There are no obstructions there of any kind, or guards of any kind that would prevent anybody from going up and down that street.

Q. It is within that part of the stock yards that is enclosed at night, is it not?

Mr. Rynder: Watch that question carefully.

The Witness: I do not know whether that end of the stock yards has got a gate or not, Mr. Smith.

Mr. Rynder: Wait a minute, Mr. Tally. I asked you to listen to that question carefully.

Mr. Smith: That may be a better question than I had in mind. Let us have it read.

Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

Mr. Rynder: Consider the first part of that question. Is it in the stock yards at all?

The Witness: It is not in the stock yards at all.

Mr. Rynder: All right. That was rather a clever question, and I did not want you to give the Examiner the wrong impression.

By Mr. Smith:

Q. Where is Packers Avenue? Point it out on the map, exhibit 1.

A. Packers Avenue is not shown on this map.

[fol. 235] Q. Is it parallel to and west of Racine Avenue?

A. It is, yes, sir.

Q. How far west?

A. Two blocks, probably.

Q. How many blocks east of Ashland Avenue?

A. I think that is about four blocks east of Ashland Avenue.

Q. Now, what is the route that this livestock unloaded at the points you have just described would traverse in reaching Packers Avenue?

A. These unloading chutes end within a block of Packers Avenue.

Mr. Rynder: I wish the witness would designate it, so we will have it in the record a little bit better, as to just what he means by "this".

The Witness: Well, the livestock would——

Mr. Rynder: I do not want to put language in his mouth, but he could say "the westerly end of unloading chute No. so-and-so," and so forth.

The Witness: Yes. The western end of the unloading chutes known as platforms Nos. 1 and 3 are—that is, the terminus of those unloading chutes are within one block of Packers Avenue.

By Mr. Smith:

Q. There is an outlet from those chutes to Packers Avenue now, is there?

A. There is a gate at that end that would permit of livestock being transported from that location to Packers Avenue, yes, sir.

[fol. 236] Q. And if they were taken out through the gate, then what conditions would they encounter from that point to Packers Avenue?

A. They are not very desirable. I agree to that. There are tracks located in and around there that might require some difficulty.

Exam. Carter: What are the undesirable features?

The Witness: The railroad tracks in and around there.

By Mr. Smith:

Q. How many of them are there?

A. At that particular point I have in mind, I think there are two sets of tracks.

Q. How many are there in each set?

A. Two tracks for each set. That would be four tracks.

Q. Is that a crossing, a regular crossing now?

A. Yes. The Chicago Junction and the line haul carriers I believe use those tracks to some degree.

Q. They use the tracks to some degree?

A. Well, to pull their engines in.

Q. They use them for——

Mr. Rynder: Just a moment, please.

By Mr. Rynder:

Q. Does the street run right across those tracks?

A. Yes, sir.

Q. And does the traffic use it, generally speaking? Do all kinds of traffic use it?

A. Yes, sir.

[fol. 237] By Mr. Smith:

Q. Just what traffic uses that street, and where does it come from? Does it come off of these unloading platforms?

A. No, sir.

Q. What traffic is it?

A. Well, from the unloading chutes I have in mind where the gate—from the stock yards property, would go in a westerly direction to Packers Avenue.

Q. Yes.

A. And there is not much traffic, if any, at the present time.

Q. You watch these questions of Mr. Rynder a little bit, will you?

A. I am trying to watch both of you, but it is a pretty tough job.

Q. There is not any traffic crossing those tracks at this time, is there?

A. I will not say there is not any traffic, Mr. Smith, but it is not traffic that is going down Packers Avenue.

Q. Now at the point where Packers Avenue——

Mr. Rynder: Wait a minute. I do not want to get the facts confused. Did you say it is not traffic going down Packers Avenue?

The Witness: Yes.

Mr. Rynder: I thought a moment ago you told me traffic moved north and south on Packers Avenue.

[fol. 238] Mr. Smith: You are just mixed up, Mr. Rynder. We have not gotten to Packers Avenue, yet.

The Witness: Mr. Rynder, I am talking about a gate at the west end of platforms Nos. 1 and 3, going west about a block or less to Packers Avenue.

Mr. Rynder: Then you are talking about an easterly and westerly street that leads to Packers Avenue?

The Witness: Yes, sir.

Mr. Rynder: You are not talking about traffic north and south on Packers Avenue?

The Witness: No, sir.

Mr. Rynder: O. K.

By Exam. Carter:

Q. Has that street a name?

A. No, sir.

Q. Is it a street?

A. I do not believe it is, no, sir.

Q. What is it?

A. It is just an outlet from the stock yards that may be used to reach Packers Avenue.

By Mr. Smith:

Q. It is an outlet in the sense only that there is a gate there, is that not so?

A. Yes.

Q. But nothing goes through the gate now?

A. No. I say, there is the opportunity for providing facilities to reach the street.

[fol. 239] Q. Now, when livestock reaches Packers Avenue, that, within the terms used in your complaint, is the nearest public street with respect to some of the livestock, is it?

A. Yes, sir.

Q. With reference to the livestock unloaded at certain places?

A. Yes, sir.

Q. It satisfies the definition of a nearest public street in your complaint; but whether it is a public street or not you do not know, actually?

A. But it is used as a public street.

Mr. Rynder: I would like, in connection with all of this examination, to avoid an objection, to have it understood that we are in no sense dictating or asking for a particular route to any particular point on any public street. Whatever the defendants may find most convenient in that respect and will designate for us, we will accept.

By Mr. Smith:

Q. Well, now, you have referred to two of these nearest, more or less public streets. Are there any others that are the nearest public streets with reference to certain livestock?

A. No, not nearest. There are other outlets, but they are not the nearest to the unloading facilities.

Q. These are the three that would be nearest?

A. Yes, sir.

Q. Now, with reference to the livestock that would be [fol. 240] handled over Laurel Avenue, which I understand you recognize as not being a public street, that stock would be moved out to the intersection of Morgan and 39th Street, now known as Pershing Road?

A. Yes. That would be the outlet to it.

Q. That stock would be taken from the unloading chutes and moved out to Laurel Street, so-called, first?

A. Yes, sir.

Q. What conditions would it encounter from that point over to the intersection of Morgan Street and Pershing Road?

A. Well, there are railroad tracks between the north end of the stock yards—at Laurel Avenue, about three or four hundred feet this side of Pershing Road.

Q. Do you know how many tracks there are?

A. No. I would say probably 12 or 14 sets of tracks.

Q. Is there any railroad traffic on these tracks?

A. Yes.

Q. Is there much?

A. Yes.

Q. There is a great deal, is there not?

A. Yes, sir.

Q. Would the crossing be at grade?

A. On the tracks?

Q. Yes.

A. I do not think there is a grade, no.

[fol. 241] Q. No. I am sorry. You misunderstood me.

A. What was your question?

Q. I mean, do the animals cross the tracks on the same grade.

A. No.

Q. You know what a grade crossing is, do you not, Mr. Tally?

A. Yes.

Mr. Rynder: He means the track is not elevated above the street, or the street lowered below the tracks.

The Witness: No. It is on the street level.

Mr. Smith: All right.

The Witness: I thought you were talking about going up a hill.

By Mr. Smith:

Q. Those tracks to be crossed lead from approximately the north boundary of the stock yards up to the south boundary of Pershing Road?

A. Yes; probably 75 per cent of the distance there has tracks on it.

Q. What is that distance?

A. (No answer.)

Q. You do not need to answer that unless you know.

A. Well, I know it is either a block, or within a block. I do not think it is much more than a block.

Q. Now, either you or Mr. Rynder said yesterday that it was a matter of indifference to you whether the animals were turned over to you at these various unloading chutes [fol. 242] in the yards to be transported to this nearest public street, or whether the railroads did it themselves. Do I understand correctly that to be your position?

A. Yes. We are willing to accept the livestock at the unloading chutes and take it to whatever point of egress the carriers may provide for the outlet; or, if the carriers want to bring it down to that point of egress, we will accept it at that point.

Q. Is you accept it at the unloading chutes, what will you do with it immediately?

A. We will take it through the point of egress provided by the carriers.

Q. How would you do that?

A. We contemplate taking it by truck. That, of course, has not been reached—that point has not been reached. We have to first find out the egress of the facilities before we can determine how we are going to take it away from there.

Q. You plan to do that with trucks?

A. That is the practical method of doing it, yes, sir.

Q. You would just as soon do it by truck, or drive them over the streets?

A. I do not believe we will drive it over the streets.

Q. What is that?

A. I do not believe we will drive it over the streets.

Q. I mean, out to the outlet of the yards.

[fol. 243] A. Out to the point of egress?

Q. Yes.

A. We will drive it there, yes.

Q. You would either drive it or move it by truck, or the railroad, as you view it could bring it out to that point?

A. To the point of egress.

Q. Yes.

A. Yes, sir.

Q. And if you drove it out, then what would you do with it when you reached the public street?

A. Well, at the point of egress, if it were developed to be a practical way to do it, we would undoubtedly load it in trucks at that point and haul it to our location.

Q. You would have trucks parked at these various nearest streets, would you, to pick up the traffic that came from the various locations in the yards?

A. That is a possible, tentative plan. I do not know what plan would be worked out after this point of egress was provided. We would have to determine then what would be the most practical method of handling.

Q. How many cars of direct shipments arrive at the Union Stock Yards in the course of a year?

A. I do not know.

Q. Have you any idea?

A. No, sir.

[fol. 244] Q. Well, if it ran as high as 20,000 carloads, do you think you could get enough trucks parked on these nearest public streets to carry it away?

A. I do not know that. I would have to assume the facilities of egress provided by the carriers would take care of the volume of traffic of that nature. That, of course, would be a matter that they would have to consider themselves, having in mind the volume of business.

Q. Who would have to consider?

A. The railroads.

Q. Well, the packers would have to give it some consideration, too, would they not, inasmuch as they would have to take it from those points and dispose of it?

A. I do not know that it is the packers' problem until they find out the facilities offered by the carriers to make this egress.

Q. You cannot drive it over the streets, can you—or, have you considered that?

A. Well, it is my understanding there is a city ordinance against it, although I do see livestock driven over the streets at the north—north of 39th Street, although I think there has been a lot of that discontinued. They are being trucked from the yards over there now. They are being loaded on trucks at the yards and taken over there, rather than being driven, as they used to do in the days when I was over there.

[fol. 245] Q. If the traffic were driven out of the yards to these points of egress as you have termed them, where would the loading of the livestock occur? Would it occur out in the public street, or, as you conceive it, are the railroads obliged to furnish you a loading place inside the confines of the yards?

A. Well, I do not know that that is a question I can answer at this time. Their obligation is to provide adequate facilities, in my opinion, for the proper egress of livestock in the volume that may ordinarily be received through that source.

Q. Well, I will not trouble you to try to state the railroad viewpoint. It will be sufficient if you will just state your own, as to whether it is your position that what you are entitled to covers a loading place for these animals into trucks on stock yards property, or whether the loading facilities and space used will be on a public property?

Mr. Rynder: For the moment I direct the witness not to answer that question. The position of this company will be stated by counsel for this company, sir, at all times, and not by the witness.

Mr. Smith: I am merely trying to elicit from this witness——

Mr. Rynder: You may ask him to state the facts. However, counsel cannot ask my witness what the position of this company is and let it go unchallenged by me.

Exam. Carter: Do you object, Mr. Rynder?

Mr. Rynder: I have instructed the witness not to answer.

[fol. 246] Exam. Carter: What was the question?

(Question read.)

Exam. Carter: Mr. Rynder instructs his witness not to answer. I will not require him to answer that question.

By Mr. Smith:

Q. Did you participate in drawing the complaint?

A. No, sir.

Q. It is your position, is it not, that with reference to these directs, transportation continues up to the boundary of the stock yards and to the point of the nearest public street?

Mr. Rynder: Mr. Tally, I request you not to answer that question for reasons I have previously stated.

Exam. Carter: The same ruling.

Mr. Rynder: That is a question of law, asking what the position of this complainant is. I have already stated my objection to that. I will direct the witness not to answer the question.

Mr. Smith: Well, would counsel be willing to state the position of his client on that subject?

Mr. Rynder: No, sir.

By Mr. Smith:

Q. Mr. Tally, is it not the position of your company which you are supporting here that the railroads ought to enter into an arrangement under which this livestock could be brought into a public market, and give you the benefit of an unloading, and then be required to transport it out of the public stock yards and deliver it to you outside of the yards?

[fol. 247] Mr. Rynder: I offer the same objection to that question and direct the witness not to answer.

Exam. Carter: The same ruling.

By Mr. Smith:

Q. Has Swift and Company ever availed itself of the opportunity it has under the Packers and Stock Yards Act to complain about the measure of the yardage charge assessed by the yards company on directs?

Mr. Rynder: I object to the question.

Exam. Carter: Do you know whether it has or not?

Mr. Rynder: That calls for a legal conclusion. Swift and Company has had no opportunity—and my witness may be totally ignorant of that—to complain to the secretary of agriculture about transportation service, because, as Mr. Smith well knows, the secretary has no jurisdiction of the transportation service.

Mr. Smith: That is just captiously avoiding the question. What I am asking—and it can easily be answered—is whether or not Swift and Company has filed any complaint with the Secretary of Agriculture attacking or complaining about or objecting to the yardage charge which is assessed by the yards company under the tariff filed with the secretary on direct shipments to Swift and Company?

Exam. Carter: Are you directing that question at the witness?

Mr. Smith: Yes.

Mr. Rynder: I have no objection to that question.

[fol. 248] The Witness: So far as I know, they have made no attack on the yardage charges.

By Mr. Smith:

Q. What percentage of livestock slaughtered by Swift and Company at Chicago comes into the Union Stock Yards or into the Omaha plant consigned to the Omaha Packing Company or Swift and Company?

A. Of our total slaughter?

Q. Yes.

A. I do not know.

Q. Will you obtain that information, please?

Mr. Rynder: I do not think it is material. I think it would make us a lot of work.

Mr. Smith: It does not need to be done with great precision. The question is a little broader than I intended. What I would like——

Exam. Carter: What is the question?

Mr. Rynder: Here is the situation, if the Examiner please——

Exam. Carter: Let us hear what his question is. I think he is going to reframe his request.

By Mr. Smith:

Q. You slaughter stock that is brought in by truck and you slaughter stock that is brought in by railroad, is that not so?

A. By truck to the Omaha Packing Company, and by Railroad to the Omaha Packing Company, yes, sir.

Q. Do you slaughter any livestock that is brought into the [fol. 249] Union Stock Yards and Transit Company?

A. Well, we buy a large quantity of livestock on the market, on the Union Stock Yards, that is offered for sale by commission men.

Q. What I would like to know is, using as a base the total amount of stock you slaughter at Chicago that comes in by rail—then I would like the percentage of that, that comes in consigned to Swift and Company and to the Omaha Packing Company.

Mr. Rynder: I decline to get up that information. I think that for all purposes and all arguments I can concede all that Mr. Smith requires. In the first place, we do not know, Mr. Examiner, how livestock arrives at the Union Stock Yards when a commission man has it for sale. We know from their annual reports——

Mr. Smith: That does not enter into it.

Mr. Rynder: Oh, yes, it does.

Exam. Carter: You do not know whether it arrives by truck or rail, is that it?

Mr. Rynder: Yes. He said he wanted the proportion, truck and rail. As to the livestock put on sale at the Union Stock Yards, we do not know how it gets there, unless it is a direct shipment to us. I think it certainly answers Mr. Smith's purpose, for any argument he may later desire to make, if I stipulate we purchase large quantities on the yards from the commission men which are not involved in [fol. 250] this case at all, and that we receive large quantities otherwise sent there.

Mr. Smith: Mr. Examiner, I think it is material, and is information that the Commission ought to have as to what percentage of livestock Swift slaughters that comes in consigned to them.

Exam. Carter: Can you not furnish that approximate figure? You do not want the exact figure, do you?

Mr. Smith: No. I said I did not want it precisely. I would like to have an approximation for the first four months of this year.

Exam. Carter: That does not include truck shipments. That is by rail.

Mr. Rynder: If we slaughtered only five cars a year, does it change the issue under this complaint, as to whether an unreasonable practice has taken place?

Mr. Smith: Mr. Examiner, I shall be glad to explain why I think this is material, if you are interested. These producers who ship to the commission firms are paying these yardage charges. As I shall contend, the purpose of the stock yards is to supply a public market. As I shall contend, these packers are seeking a premium on the purchase of stock other than on the Chicago market, and I think it is almost impossible to have a case before the Commission in which some consideration is not given, and should not be given to the public interest. I say that it is perversion of [fol. 251] the whole underlying theory of section 15 paragraph 5, to permit livestock to come into a market, a public market, and get free unloading and then be immediately transported out of the market. I say to do that creates discrimination in the assessment of charges within the market and operates to devitalize the market. I think it is a material consideration for the Commission to have a mind in dealing with this problem.

Mr. Rynder: It seems to me that Mr. Smith is for the present taking the place of our distinguished Secretary of Agriculture. He is trying to consider the welfare of all of the agricultural population. If we go into that subject, we will be miles and miles away from the Interstate Commerce Act or the Packers and Stock Yards Act. For any reasons stated up to this time, I decline to furnish that information. I do not want to appear arbitrary about it. It seems to me if I admit that during the last year we received five cars consigned to Omaha Packing Company and we bought five cars, on the Union Stock Yards from commission merchants that went through the stock yards to our plant, that I have every right to bring this case and have it decided.

Mr. Smith: I have not said that you do not have. I am asking for some information that will help to decide it.

Mr. Rynder: You will not get it from me. I have a different theory of the case. I am not going to argue about it.

Mr. Smith: Unfortunately, Mr. Rynder, I cannot confine [fol. 252] my request to your theory of the case.

Mr. Rynder: I am not going to ask our accounting department to go through thousands of purchases every day —or rather, I mean, thousands of purchases every year, and at least hundreds of purchases every day, to make up that data.

Exam. Carter: Do you want me to rule on your request, Mr. Smith?

Mr. Smith: Yes. I wish you would rule on it, Mr. Examiner.

Exam. Carter: My ruling is that the complainant shall furnish that information roughly. Perhaps it could be furnished before the close of this hearing, but I will rule it should be furnished within 15 days after the hearing is closed.

Mr. Rynder: May we take a minute off the record?

Exam. Carter: My ruling is not that you must furnish the exact figures—you can do it if you desire—but, my ruling is that you should furnish the approximation, similar to the approximation that Mr. Reneker furnished with respect to that other question.

Mr. Rynder: If you are through with your statement, I would like to go off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. With respect to the request made by Mr. Smith, and with respect to my ruling thereon, I understand from Mr. Rynder that Swift and [fol. 253] Company has no way of ascertaining whether the stock which they purchase on the Chicago stock yards market arrived at that market by rail or by truck or otherwise. Is that correct?

Mr. Rynder: That is right.

Exam. Carter: In view of that statement I will have to rescind my ruling. I assume Mr. Smith will withdraw his request for that particular information.

Mr. Smith: I do not want to request anything that cannot be furnished.

Mr. Rynder: Just a moment, please. Let me get this down.

Mr. Smith: Are we on the record now?

Exam. Carter: Yes. We are on the record.

Mr. Smith: Please show for the year 1937,—is 1937 a typical year, Mr. Rynder?

Mr. Rynder: I do not know that any year is typical, but it is the latest year.

Mr. Smith: Please show for the year 1937 the number of hogs slaughtered by Swift and Company at their Chicago plants; also the number of hogs purchased by Swift and Company from commission firms on the Union Stock Yards; also the number of hogs received at the Omaha Packing Company plant or at the Swift and Company plant billed to respectively the Omaha Packing Company or to Swift and Company.

Mr. Reneker: Mr. Smith, may I ask you one question?

Mr. Smith: Yes.

[fol. 254] Mr. Reneker: You just want the number of directs, not those that are billed to Omaha Packing Company for sale there?

Mr. Smith: I said, everything that was consigned either to Omaha Packing Company or to Swift and Company, so as to include those coming in consigned to Swift under some arrangement with the shipper, 99 per cent of which are handled in some private arrangement between the shipper and Swift.

Mr. Reneker: I do not think we want to give any percentages on what we receive. That is our own business. It is not a matter of public record. We have a perfect right to serve a clientele; we should not have to tell that, any more than——

Exam. Carter: Mr. Reporter, read Mr. Smith's request again.

(The record was read.)

Exam. Carter: Now, with reference to those two things would you have any objection to furnishing them?

Mr. Reneker: Mr. Smith, let me say right there that hogs bought on the Chicago market include not only hogs bought from commission firms, but include hogs bought from speculators. We have no way of segregating that. Any total bought on the Chicago market would include hogs bought from speculators as well as hogs that had come in there shipped direct.

Mr. Smith: They ought to be——

Mr. Rynder: If the Examiner please, I would like to make one statement there.

[fol. 255] Exam. Carter: Let us take these things one at a time.

Mr. Rynder: All right.

Exam. Carter: The first is the total number of hogs slaughtered by Swift and Company in the Chicago plant.

Mr. Rynder: Yes. Now, for reasons that at some times may not entirely appeal to me, these packers object to giving out to competitors—they do in any public record—the exact amount of business done at some public place. I am asking whether Mr. Smith can modify that in some way just to say that there has been a substantial amount, as, for instance—I am speaking now out of thin air—suppose it were admitted to be an amount satisfactory to him; suppose we should say it was more than 300,000 or 400,000 or something like that?

Mr. Smith: You can show the percentage.

Exam. Carter: All you are interested in, as I understand it, is percentages.

Mr. Smith: Yes.

Exam. Carter: Let us go on with the other part of the request, then. You are making that request in the form of a request for percentages?

Mr. Smith: Yes.

Exam. Carter: I just want to get the individual items that would form the basis for the computation of that percentage. First would be the total number of hogs——

Mr. Reneker: I can just state it right now in terms of [fol. 256] percentage, if the Examiner would care to have me.

Exam. Carter: Just a moment.

Mr. Smith: Here is my request: the ratio which the hogs consigned to Swift and Company and the Omaha Packing Company and Hammond & Chicago bears to the total hogs slaughtered by those companies at Chicago, in the same period, now, 1937.

Exam. Carter: When you use the word "consigned", do you mean shipped on consignment to Swift and Hammond, or does it include those shipped on consignment and those actually arriving——

Mr. Smith: Yes.

Exam. Carter: —at the Omaha Packing Plant and owned by Swift at the time of arrival?

Mr. Smith: I am differentiating on the one hand between those that are consigned to Swift under those other arrangements, and on the other hand those that are purchased in the open market in Chicago.

Exam. Carter: Do you understand what that ratio is?

Mr. Rynder: I have a rough note here: the percentage the hogs consigned to Swift and Company, Omaha Packing Company and Hammond & Company, if any, at Chicago bears to the total hogs slaughtered by these three companies at Chicago, in 1937. I am informed we could probably have that information tomorrow morning.

Exam. Carter: I see.

[fol. 257] Mr. Smith: All right.

Mr. Rynder: Furthermore, I do not think it is what Mr. Smith wants. Perhaps 50 per cent of it moved in by trucks.

Mr. Smith: I would rather have an actual showing on that, than your statement about it. I think you ought to show what the fact is and not speculate on it, so you can advise us that that is the fact, with fair reliability.

Mr. Rynder: I can advise him exactly what he asks in the very terms he asked it. Mr. Reneker can probably do it.

Exam. Carter: He was speaking about your statement about the amount of truck business—were you not, Mr. Smith?

Mr. Smith: Yes.

Exam. Carter: As being speculative.

Mr. Rynder: No. His question, in form, is this: the percentage that the hogs consigned to Swift and Company, Omaha Packing Company and Hammond & Company, at Chicago, in 1937, bears to the total hogs slaughtered at Chicago by these companies in 1937. I am saying I can give that to him right this afternoon or tomorrow morning.

Exam. Carter: Yes. That is right.

Mr. Rynder: Then it will not be what he wants.

Exam. Carter: I cannot answer as to that. I assume that is what he wants.

Mr. Rynder: I am simply calling attention to it now, so it will not come up later.

[fol. 258] Exam. Carter: We will recess for five minutes.

Mr. Rynder: A large quantity of the stuff comes to Omaha Packing Company by truck. That would have to be figured. It would just mean going through every individual contract. I do not know just how those contracts are kept.

Exam. Carter: I see.

Mr. Rynder: As to whether they come in by car, or truck.

Exam. Carter: We will take a five minute recess.

(Short recess.)

Exam. Carter: Come to order please, gentlemen. Have you a statement to make, Mr. Rynder?

Mr. Rynder: We can furnish the information requested by Mr. Smith's last question.

Exam. Carter: Very well. Proceed.

By Mr. Smith:

Q. Mr. Tally, you said that direct shipments include shipments purchased at other yards and shipments purchased in the country.

A. Yes.

Q. Is that right?

A. That is right.

Q. How do those divide as between those two categories?

A. I do not know that one, either.

Q. Do you have any judgment about it?

A. My judgment would be the greater amount was in the country, but I do not know that to be a fact.

[fol. 259] Mr. Smith: Is there going to be anybody on the stand who knows that, Mr. Rynder?

Mr. Rynder: There is not going to be anybody on the stand that has that information exactly. I do not know, as a competitive matter, whether we care to disclose it. Just for your information, and not at all as evidence, I may say we operate a lot of buying stations in the country owned by us. I may say that we buy livestock also, on I think every public market of importance from Denver to Chicago. There are some, on our more easterly——

Mr. Smith: Some of the latter is not slaughtered at the place where purchased, but slaughtered at other plants, is that right?

Mr. Rynder: That is right. To make a segregation of that would again require a lot of study from the accounting standpoint.

Mr. Smith: The witness has said that the preponderance of it was purchased from the country, when he was pressed to give a reply. May we accept that?

Mr. Rynder: Yes, sir, but whether that preponderance is 51 per cent or 71 per cent, I myself do not have the slightest idea.

By Mr. Smith:

Q. How long, Mr. Tally, has the practice prevailed of Swift buying certain livestock on certain public markets and shipping it to other public markets, if you know?

[fol. 260] A. I do not know how long they have been buying livestock at other public markets, and shipping them to other locations.

Q. You have been with the company 20 years?

A. Yes.

Q. That has occurred throughout the 20 year period that you have been there, has it not?

A. I do not know whether it did to any extent during all of that period or not, Mr. Smith. My information on direct shipments dates back to the period when we commenced buying livestock in the country, which started in a small way as I testified, in about 1927, and got to be on a larger scale in 1929.

Q. Now, let me ask you another question.

A. Whether prior to that time they purchased livestock on other markets and shipped them to Chicago, I do not know.

Q. Well, now, you would not swear that Swift has not paid yardage charges on direct shipments at the Chicago yards ever since the Packers and Stock Yards Act was passed in 1929, would you?

A. I would say Swift and Company has paid yardage charges on all shipments they received through the Chicago Union Stock Yards consigned to them direct.

Q. You won't say they have not paid such charges on directs which have been received ever since that Act has been in effect, since 1921?

A. It is my understanding they have paid a yardage charge on every head of livestock that was consigned to [fol. 261] them direct, that they received through the stock yards.

Q. Do you not know as a matter of fact that Swift and Company has received direct shipments at Chicago ever since it has operated at Chicago?

A. I told you I did not know.

Q. You do not know anything about it?

A. Prior to the time they commenced buying livestock in the country, I know nothing about that. That is when I first became acquainted with the fact they were making direct shipments to themselves at Chicago.

Q. Let us get that straight. You are the rate man for Swift and Company, are you not? You have been handling rate matters for 20 years.

A. Yes, sir, and not always livestock rates.

Q. How long have you been handling livestock rates?

A. Well, I have had general supervision over all rates about 8 years. Prior to that time I quoted freight rates and handled dairy product rates. We have a separate division under the general jurisdiction of the man in charge of the rate division, but I did not specifically handle livestock rates.

Q. Well, does that mean your information on direct shipments goes back 8 years, then?

A. I have knowledge of direct shipments since we commenced buying in the country and locating buying stations at those points, which goes back probably 10 to 11 years—[fol. 262] 1927—when they really entered into that method of purchasing livestock in the country.

Mr. Smith: Does Mr. Reneker know when Swift and Company first had consigned to it at Chicago shipments of livestock purchased by it in the country, Mr. Rynder?

Mr. Rynder: Do you know, Mr. Reneker?

Mr. Reneker: Not definitely, but approximately.

Mr. Smith: I want to know when the first shipment of livestock purchased in the country and consigned to Swift and Company came into the Union Stock Yards at Chicago or to the Omaha Packing Company plant.

Mr. Reneker: You would have to go back 45 years, to the Omaha Packing Company plant.

Mr. Smith: Why?

Mr. Reneker: I do not think there is any record that would show it. I do not think we have records ourselves that would go back that far. They have been in operation that long.

Mr. Rynder: For your information, I think the Omaha Packing Company plant was built about—do not take this please, Mr. Reporter.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: Mr. Rynder, you just made a statement as to when the Omaha Company began to ship livestock to Chi- [fol. 263] cago, purchased by it in the country. Will you make that statement on the record?

Mr. Reneker: That is a tough question.

Mr. Rynder: Just a moment, Mr. Reneker. Let me answer this.

Mr. Reneker: All right.

Mr. Rynder: What I stated off the record was my understanding that the Omaha plant was a very old plant, erected perhaps as far back as 1865; that after some years of existence under a different management—I am not sure of the exact number—its stock was purchased by Swift and Company. I think that would have been somewhere at least as early as the 1880's. During its prior ownership and during our ownership it has depended almost entirely upon soliciting shipments to be sent to it direct.

Mr. Smith: All right. So much for the Omaha Packing Company. What about Swift and Company?

Mr. Rynder: I should imagine, if you are looking for merely single shipments, the same thing might have been true of Swift. That is to say, I can remember from my own recollection in the war days, that sometimes there would be an oversupply of some other market and the government sometimes would ask us if we would not take it, and if we could not use it at that point, we would ship it on to Chicago. But, that was an occasional emergency practice during that period. The shipments of directs to the market in substantial quantities would be as stated by Mr. [fol. 264] Tally.

Mr. Smith: Mr. Examiner, I do not want there to be any secret about what I have in mind. In the Hygrade case it was recognized by everybody that the packers had been paying yardage charges on direct shipments consigned to them for 70 years, and I was amazed when I heard the statement made yesterday that this was just an innovation, something that was just starting. Perhaps I got an impression that the witness did not intend to convey, but if it is the position of Swift and Company that this business of getting directs at Chicago and paying yardage charges on them is something new, something that has just started, then I am going to show it is not so.

Mr. Rynder: I do not think that is the proposition. I

think that Mr. Tally's testimony is undoubtedly to the effect that this did not become a matter of consequence to us until about 1927. I am very sure that if we received directs before that time, as we doubtless did, in some instances, that we paid the yardage charges of the Union Stock Yard and Transit Company as we are paying them now.

Mr. Smith: Mr. Examiner, unless the complainants are willing to concede that they have received direct shipments at Chicago and paid the yardage charges on them for many years, I ask that they prepare a showing for every tenth year back as far as they have records to develop that fact.

Exam. Carter: Did you hear that request, Mr. Rynder?

[fol. 265] Mr. Rynder: I did not hear the request. I was trying to look up what Mr. Smith was referring to. I am sorry.

Exam. Carter: Read Mr. Smith's statement please, Mr. Reporter.

(The record was read.)

Mr. Rynder: That is evidently part of his defense.

Exam. Carter: That information is more readily available to you than it is to the defendants, is it not, Mr. Rynder?

Mr. Rynder: Oh, no; not a bit.

Mr. Smith: Of course it is.

Mr. Rynder: How many years did you say?

Exam. Carter: Every tenth year.

Mr. Smith: Back as far as you have records.

Mr. Rynder: I do not think we have but very few records that are over five years old. I think all of our transportation records, under orders of our accounting department, unless held out because involved in some case or something of that kind, are destroyed after three years.

Mr. Smith: Let me make one statement there, Mr. Rynder.

Mr. Rynder: Our general financial records which are kept permanently show nothing about this.

Mr. Smith: We seem to be creating issues here, Mr. Rynder, when I do not think there are not any real issues. We have to get too much of our information from the recollection of counsel, because the witnesses do not have it.

[fol. 266] You yourself have said that back prior to the war you had personal knowledge of what was happening, that these directs were coming in. Why can we not have a wit-

ness here who can give the same type of information for this company, as a witness?

Mr. Rynder: Mr. Smith, you are trying the defendants' case, I am not. I am putting on my case in my own way, and if I fail in it, that is the misfortune of myself and my client. I have been trying to agree and assist you in as many things as I could here. I say that if livestock consigned directly to Swift and Company arrived during these years prior to 1927, we undoubtedly paid the yardage charge that was then in effect.

Mr. Smith: What about this livestock——

Mr. Rynder: There is no question about it. Nobody ever got stock out without paying it.

Mr. Smith: What about stock purchased on other markets prior to 1920, that you referred to? How far back does your recollection go?

Mr. Rynder: What I was referring to at that time was during the war period. I said it was generally the practice, and in fact is now the general practice to try to purchase livestock at the market where it should be slaughtered —there are obvious reasons for it—but, during the war period we were almost taken over as part of the government, and if up at St. Paul there were 8000 hogs more than could be used by the two plants, some government officer might say to us, "Buy them and take them to Chicago", [fol. 267] and he might do the same thing at Kansas City. When we did that we undoubtedly paid the yardage at Chicago as we do now.

Mr. Smith: Are you saying that the practice of receiving directs at Chicago started at that time, or are you recognizing that it started prior to that time?

Mr. Rynder: It might have happened at any time. In other words, at any time in the history of Swift and Company there might have been a time when for some reason or other a couple of cars were purchased at Omaha and used at Chicago. That might have been just because of the factual condition of business at that moment. But, I am not in any way modifying the statement of my witness that this became a matter of concern to us, because it had grown to substantial proportions, about 1927.

Mr. Smith: I want to discuss that with some of my associates. I will bring it up later.

Mr. Rynder: All right.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Mr. Tally, you referred to a number of tariffs here covering stock yard services at points other than Chicago, did you not?

A. I referred to a number of tariffs that provided for egress from the yards on direct shipments.

Q. When did the rules embodied in those tariffs which you specifically referred to, become effective first?

[fol. 268] A. Well, I do not know when they first became effective, but I suppose that information would be available by checking back the tariffs.

Q. I am not asking you where you could get it. You have answered my question. You say you do not know. Do you maintain plants at all of those points?

A. Not at all the ponts I included in my exhibit, no, sir.

Q. At how many of them?

A. Well, Cleveland, Baltimore, Detroit, Los Angeles. I think that is all.

Q. Four out of the thirteen?

A. Yes, sir.

Q. Have you ever worked at any of those points? Do you know anything about the volume of direct shipments to those points?

A. No; only in a general way.

Q. Well, how many direct shipments were received at Buffalo, New York, last year?

A. We do not have a plant at Buffalo. I would not know that.

Q. You would not know it at any place where you did not have a plant?

A. No, sir.

Q. Take one where you do have a plant. You have named four. Tell me how many directs were received at any one of them.

A. Mr. Smth, I am not trying to be facetious, but if I had all of that information in my head, I do not know what [fol. 269] condition it would be in. I cannot answer that question.

Q. You do not have it in your head?

A. No.

Q. Do you have it in your worksheets?

A. No.

Q. From which you made this up?

A. No, sir. I did not need any worksheets to make this up.

Q. When did those direct shipments start as to these other points?

A. I do not know that, except that our general policy of buying direct commenced in 1927.

Q. Your general policy has not anything to do with what happened at these other yards at which you do not have plants, did it?

A. No, sir, not our general policy.

Q. Do you know what the policy of these other people is at these plants?

A. No, sir. The competition of buying livestock, so I am informed, is very drastic between packers buying out in the country.

Q. I think I must have misunderstood you yesterday. I understood you to say or attempt to give the impression that this matter of shipping directs was a recent development, and that to meet that recent development, these tariff rules that you referred to in your exhibit No. 18 were made effective. Is that what you said?

[fol. 270] A. I presume they were put in there by these different interests to meet a practical situation then existing and now existing.

Q. You presume that, but you know neither when the tariff provisions became effective, nor when direct shipments of livestock to those points started, do you?

A. No, but I think I have ordinary sense and am able to figure out why something was established.

Q. But you do not know when it was established, do you?

A. No, I do not.

Q. Your testimony about that yesterday, about these rules being inaugurated to meet this recent development, is based simply upon your assumption——

Mr. Rynder: Let me interrupt just a moment. I know Mr. Smith does not want to misquote the testimony. Mr Tally did not testify anywhere that these tariffs at Cleveland and the other points outside of Chicago had been published to meet any recent development.

Mr. Smith: I gave the witness a chance to say that we got the wrong impression from him.

Mr. Rynder: You put some words into his mouth, and for a moment he overlooked what his direct testimony had been, and accepted your statement.

Mr. Smith: He is not saying that, then?

Mr. Rynder: Certainly not. There were no such words, [fol. 271] or no such testimony offered about these tariffs outside of Chicago. There was nothing offered except the existing fact.

Mr. Smith: Well, there were several of us that got the impression I just expressed.

Mr. Rynder: Well, if you doubt it, I can give you a copy of the memorandum Mr. Tally had, and I think you will find it so, in the transcript of record.

By Mr. Smith:

Q. Again I will give you my impression of a statement you made with reference to the handling of livestock consigned to commission firms, with respect to how it is handled in the yards,—or, rather than giving my impression of what you said, I will ask you if you know how livestock consigned to commission firms is handled in the yards.

Mr. Rynder: That seems to be a very involved question. Read it to me please, Mr. Reporter.

(Question read.)

Mr. Rynder: Do I understand by that you mean the yards of the Union Stock Yard and Transit Company?

Mr. Smith: Yes, and more specifically, Mr. Rynder, as to how it is handled from the time it is unloaded until it arrives in the commission firm's pen.

Mr. Rynder: I had no objection, except I wanted to know if you referred to the Chicago yards. I am not critical of your question at all.

Mr. Smith: All right.

[fol. 272] By Mr. Smith:

Q. Will you answer the question please, Mr. Tally.

A. Livestock is unloaded at the unloading chutes and they are taken by stock yards employees to the pens assigned to the commission men, or firms, where it is offered for sale, and then when sold——

Q. Just a moment, please.

A. Yes.

Mr. Smith: I am not interested in it after it is sold. Mr. Reporter, read the witness' last answer to me, please.

(Answer read.)

Mr. Smith: All right.

By Mr. Smith:

Q. As I understood your testimony, in contradistinction to that you told how directs were handled. What did you say about that?

A. The directs, Mr. Smith——

Mr. Rynder: Well, Mr. Tally, let me call your attention to the fact that Mr. Smith chopped you off—just like that—when you told him half of the service performed for the commission men.

Mr. Smith: If you want him to finish, I have not any objection.

Mr. Rynder: I thought you were just stopping him at a designed point.

Mr. Smith: No, no. You always are giving me too much credit, Mr. Rynder.

[fol. 273] By Mr. Smith:

Q. Do you want to go ahead and finish anything you had to say about that now?

A. What am I supposed to do now?

Exam. Carter: You had described what happened to the livestock up to the time it was put in the pens of the commission man. Will you give any further description you now want to give?

The Witness: Well, to complete the transaction, I would say when it is sold it is then taken to the scales and weighed and then turned over to the purchaser of the livestock by placing it in such pens as may be assigned for that purpose; or if it is to be shipped outbound, it is placed in outbound shipping pens to be later loaded in railroad box cars. Now, an exception that might be made to that would be where the desire of the commission man is to get his stock quicker than might result from the ordinary handling of livestock by the stock yards employees, and his own employees will take possession of the stock and drive it to the sales pens and from that point, when it is sold, over the scales in order to expedite the handling of the livestock. In answer to the next question, on directs——

By Exam. Carter:

Q. The charges are not the same, though, in those series of transactions, are they?

A. There is no difference in the charges accruing, to my understanding. They are merely——

[fol. 274] Q. I mean, if livestock was sold to a buyer after it reached the Commission man and he shipped it out, there would be a different charge, would there not?

A. There would be no difference in the yardage charge.

Q. The yardage charge would be the same in both instances?

A. Yes, sir.

Exam. Carter: Go ahead.

The Witness: In the case of directs, they are unloaded and either turned over to our employees at the unloading pens, or put in holding pens awaiting arrival of our employees to accept delivery of them.

By Mr. Rynder:

Q. Under the present practice?

A. Yes, sir.

Q. And not under the practice you are seeking?

A. No, sir.

By Mr. Smith:

Q. Should we understand that with respect to this livestock consigned to commission firms, 100 per cent of it is handled in the way you have indicated, namely, that employees of the stock yards company take it from the unloading chutes and take it down to the pens of the commission men?

A. With the qualification that I gave to it, while you were over there talking to that young man.

Q. Would you mind repeating that qualification?

A. In an effort by the commission men to expedite the handling of that livestock from the unloading chutes or such [fol. 275] holding pens as they might be in, to get them over to their sale pens quicker than he would get them if he waited for the stock yards employees to bring them over—and that likewise applies when they have sold the livestock—one of their employees may take them immediately to the scales, have them weighed, and to the buyer of the livestock, rather than to wait the handling of the livestock through that same medium by the stock yards employees.

By Exam. Carter:

Q. Do not some of the commission men make it a practice to handle livestock from unloading pens with their own employees?

A. Yes, they do, for the purpose of expediting the handling of it, to get it to their pens to be available for sale quicker.

Mr. Rynder: Just a moment, Mr. Tally.

By Mr. Rynder:

Q. Is that a voluntary service in their part?

A. Oh, yes, absolutely. It is absolutely a voluntary service.

Q. In spite of the fact they happen to do that, they pay the same yardage that would have been paid if the yards employees had done the full service?

A. Yes.

Mr. Rynder: All right.

By Mr. Smith:

Q. Mr. Tally, you have made an investigation of that situation and you know how it is handled, do you not?

A. Well, I was out in the yards for a year.

Q. How long ago?

A. About 20 years ago.

[fol. 276] Q. Have you made any investigation as to how it is handled, since that time?

A. I never heard of any change in the operation.

Q. You knew what it was 20 years ago, and you have not heard of any change being made, is that the situation?

A. That is right.

Q. Your first statement was that the employees of the stock yards take these animals from the unloading chutes and drive them down to the commission firms pens; you qualified that by saying that if expedition was required, their own employees handled them. Would it surprise you to know that the stock yards employees never take animals consigned to the commission firms from unloading firms, and take them down to commission firms pens?

Mr. Rynder: I would say it was a flat lie.

Exam. Carter: Just a moment.

Mr. Smith: Let the witness answer.

The Witness: I can answer the question.

Exam. Carter: Let the witness answer the question.

Mr. Rynder: Furthermore, I object to the question, if the Examiner please, and direct the witness not to answer until the Examiner has ruled. It is improper to ask the witness whether something would surprise him. It is utterly immaterial whether Mr. Tally is surprised by necktie or anything else.

Exam. Carter: Reframe the question, Mr. Smith.

[fol. 277] Mr. Smith: I am willing to have the surprise element stricken out.

Mr. Rynder: And all the other had better be stricken out, if it is to remain within the limits of the truth. I will tell you that.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Are you sure that the livestock consigned to commission firms is never handled by the employees of the stock yards from the unloading chutes directly down to the commission firms pens?

A. Am I sure what?

Mr. Rynder: What is that question? Read it, Mr. Reporter.

(Question read.)

A. I did not so state, Mr. Smith; in fact, I said it was handled by the stock yards employees.

By Mr. Smith:

Q. Directly from the unloading chutes to the commission firms pens?

A. Not necessarily directly from the unloading chutes. They may in some cases be handled directly from the unloading chutes and again they may be yarded in holding pens while they are unloading other cars and later taken down.

Q. Is it not a fact that exactly contrary to what you have said, the commission firms go to the unloading chutes to drive a higher percentage of their animals to their pens, [fol. 278] than do the packers on directs?

A. I do not know,——

Mr. Rynder: Do you know?

The Witness: I know that the——

Mr. Rynder: Let me stop you there and ask you: do you know?

The Witness: No, I do not know. That is what I was going to answer.

Mr. Smith: Well, I thought you had qualified, for instance, to testify as to the handling of this livestock.

Mr. Rynder: You have asked him a question as to what percentage——

Mr. Smith: If he does not know, that is something else again.

Mr. Rynder: You have asked him a question as to what percentage of livestock are driven by commission men from the unloading chutes compared to the per cent that are driven by the packers.

Exam. Carter: Is this true, Mr. Tally:

By Exam. Carter:

Q. It is a very common thing, is it not, for employees of the commission men to drive their stock from the unloading platforms to the commission pens?

A. I would say it is a common practice during the day time, but the majority of the livestock by rail comes in at night and the stock yards employees are then in full control [fol. 279] and the employees of the commission firms do not come on duty until later.

By Mr. Smith:

Q. Well, now, let us take for comparative purposes shipments which are consigned directly to the packers and which are taken possession of by the packers employees at the unloading chutes, but taken over to be slaughtered; and let us take on the other hand shipments consigned to commission firms and the commission firms employees go to the unloading chutes and drive those animals down to the commission firm pens. You said, as to the directs, the transportation continues beyond the unloading chutes and continues out to some other point. What is your——

Mr. Rynder: He has not said that.

Mr. Smith: May I finish, please?

Mr. Rynder: I object to it.

Mr. Smith: What have you to say as to the——

Mr. Rynder: I have a right to enter my objection right now, when you misquote the witness. Read what he said, Mr. Reporter.

Mr. Smith: I am not quoting the witness.

Mr. Rynder: Yes, you are: You said "You said". Please read the question, Mr. Reporter.

(The question was read as follows:

"Well, now, let us take for comparative purposes shipments which are consigned directly to the packers and which are taken possession of by the packers employees at the unloading chutes, but taken over to be slaughtered; and let [fol. 280] us take on the other hand shipments consigned to commission firms and the commission firms employees go to the unloading chutes and drive those animals down to the commission firm pens. You said, as to the directs"——)

Mr. Rynder: That is the point right there. That is what I objected to.

Mr. Smith: I will take that out.

Mr. Rynder: That is an erroneous statement. The witness never said it.

Mr. Smith: I will take that out. Strike it, please, where I started to say "you said", and so forth.

By Mr. Smith:

Q. If transportation continues with respect to the direct shipments I have reference to beyond the unloading chutes, why does it not similarly continue beyond the unloading chutes with reference to the other category of shipments consigned to the commission firm?

Mr. Rynder: I object to the question.

Exam. Carter: Let me put it this way:

By Exam. Carter:

Q. Do you know any reason why it should not, speaking from the standpoint of your experience?

Mr. Rynder: I am objecting to that question. That calls for a conclusion of law.

Exam. Carter: The first one does, but he can express his opinion. In other words, in order to determine where the transportation ends, we have to have the facts, of course.

[fol. 281] Mr. Rynder: I would like to be heard on that for a moment, if your Honor will be patient with me.

Exam. Carter: Certainly.

Mr. Rynder: Certainly, as to where transportation ends on livestock we are bound to depend on certain conclusions of law, some of which are stated in the Covington case and some in the Hygrade case,—that is, taking possession of property under our conception of the carriers' duty immediately upon its arrival and getting it off of the carriers' premises in the quickest possible way. Now, Mr. Smith asks here, "Why would not that apply to a commission man?" The transportation does not end until it gets down into his yard. He is not taking it out of the nearest point of egress. He is utterly unwilling to do so. He is using their facilities out in the yards to get his stuff down to where it goes.

Mr. Smith: You cannot stand on that, because this commission firm pen may require a shorter driving distance over the yards property than to get it out to this nearest public street. You cannot predicate your position on the mere matter of feet.

Mr. Rynder: Or, it might be longer.

Mr. Smith: Exactly.

Mr. Rynder: The commission man is avowedly and purposefully and every other way you can think of, using those stock yards as a market place for his goods.

By Mr. Smith:

Q. Mr. Tally, up to the point where the animals are put [fol. 282] in the commission firm's pen, how has he used the stock yards any differently, or in any different way from the way the packer has at the time the livestock is driven into the packers plant?

Exam. Carter: Just a moment.

Mr. Rynder: Wait a minute.

Exam. Carter: Just a moment, please. Is it your position that the transportation that the commission man receives under his line haul rate is any different from the transportation that the packer receives under his rates?

Mr. Rynder: I think if the commission man demanded an egress, and demanded delivery from the carriers in the same way we are demanding it, he would have a right to it. But what would he run into? He would be silly to do it. He would move them down some place and move them back into the stock yards and pay the same 45 cent charge as a yardage charge.

Exam. Carter: That is not answering my question. Read that question.

Mr. Blanchard: He answered Mr. Smith's question. It is specifically held that the transportation charge on these animals consigned to commission men covers the unloading and driving into the commission man's pen. That is in Adams versus Mills in the 78th volume, Lawyer's Edition, Supreme Court Decision of the United States. He is asking this witness to decide a question of law that the Supreme [fol. 283] Court has already decided.

Mr. Smith: They are all paying a yardage charge for it, too, are they not, Mr. Blanchard?

Mr. Blanchard: No, sir. Not a cent.

Exam. Carter: Now, let us go back. Mr. Reporter, read Mr. Smith's first question to which Mr. Rynder made his objection.

(Question read.)

Mr. Blanchard: The Supreme Court has held it did.

Exam. Carter: Wait a minute. Mr. Rynder objected to that because it called for a conclusion of the witness.

Mr. Rynder: Yes.

Exam. Carter: Now, Mr. Reporter, read my last question to the witness.

(Question read.)

Mr. Rynder: Mr. Examiner, I will have to ask my witness not to, even at the request of the Examiner, answer a point of law.

Exam. Carter: Well, I do not think it makes much difference whether he does answer the question or not.

Mr. Rynder: As a matter of fact, I regard him as a fair, everyday lawyer, but he is not on the stand in that capacity.

Exam. Carter: I will not require him to answer the question, but he has testified here and he has stated that he had particular knowledge as to the manner in which these dif- [fol. 284] ferent classes of shipments have been handled. I think under those circumstances he would be qualified to state if in his opinion there was any difference in the transportation service performed. Let us put it that way. Now, if he does not want to answer, it does not matter, because really what he says does not make any particular difference.

Mr. Blanchard: I object to that.

Mr. Rynder: It is simply an argument of law. It is perfectly obvious, Mr. Examiner, that so long as we are kept under the present restrictions, we pay yardage and the commission man pays yardage.

Exam. Carter: I do not think it is important, as I say. I think the Commission can determine from the facts as they are developed, whether or not there is any difference.

Mr. Rynder: We are in here asking to make the carrier complete delivery to the extent we concede to be its lawful duty. There is not any reason why any commission man cannot file a similar complaint, and if we are correct, he ought to get similar relief, but the obvious reason why he would not do it is because he would go out to 39th Street and come back at 47th Street and run himself into the same yardage charge.

Exam. Carter: Let us proceed with the examination.

Mr. Smith: All right.

By Mr. Smith:

Q. You offered some testimony about the various facilities that the rail carriers maintained in the Chicago switching [fol. 285] district and in Chicago, did you not?

A. Well, I gave a general outline of my knowledge of it.

Q. When was that knowledge acquired?

A. Well, in the last three or four years.

Q. When did you inspect the facilities?

A. Within that period.

Q. All at one time, or at various times?

A. Over a period of time.

Q. What facilities did you investigate?

A. Well, Clyde, Illinois; Blue Island, on the Rock Island; Indiana Harbor, which is in Indiana; Indiana Harbor, Indiana; Calumet City. What other comments I may have made were based on the language of the Commission in the 24847 case, where they said there were only two suitable places in the city of Chicago to make delivery of livestock.

Q. I see. Has Swift and Company consigned any livestock for delivery on team tracks in Chicago or for delivery on these individual facilities that exist?

A. Not that I know anything about.

Q. You never heard of it?

A. No, sir.

Q. Do you know of anybody else who has?

A. Only as hearsay.

Q. Do you know of any shipment that was consigned for delivery at one of those points that was improperly handled?

[fol. 286] A. No. I did not hear of it.

Mr. Rynder: That is a double question.

Mr. Smith: Let him break it down and answer it in pieces, then.

Mr. Rynder: Answer the first part of it first.

The Witness: Read the question.

(Question read.)

Mr. Rynder: There are two parts to that question, Mr. Tally.

The Witness: First, I do not know if there were any consigned; second, not knowing that, I would not know whether there were any improperly handled.

By Mr. Smith:

Q. You simply have not any information about the demand for service at those other unloading facilities? Is that a fair statement?

A. Yes, sir.

Q. Now, in the decision in the Hygrade case by the Supreme Court, they made a statement which I would like to see whether you criticize. They said: "Each carrier's tariff specifies rates covering transportation of livestock to Chicago including delivery to consignee on the carrier's own line"——

Mr. Rynder: Let me get that.

By Mr. Smith—Continuing:

Q. "—but as practically all shipments to Chicago are consigned to the public stock yards, there is little if any need or use of individual carrier unloading facilities." Do [fol. 287] you agreed or disagree with that statement, or do you have enough information to have an opinion about it?

Mr. Rynder: Wait a minute, Mr. Tally. Where does that come in the decision, Mr. Smith?

Mr. Smith: Here (indicating).

Mr. Rynder: I believe Mr. Smith read two sentences there, Mr. Tally. Take the first one first. Even though this may be construing a legal question——

Mr. Smith: I would appreciate it if you would allow me to conduct my own examination. I do not want to be quarrelsome about it, but I do think I should be permitted to proceed with my own examination in my own way.

Mr. Rynder: I do not think I am being captious when you have asked a double question, to ask the witness to take both parts of it separately.

Mr. Smith: All right. Do it that way.

Exam. Carter: Go ahead. Do you remember what the question was now?

Mr. Rynder: Was the first part "Each carrier's tariff specifies"?

The Witness: Yes.

Mr. Smith: He has it right there before him.

Mr. Rynder: There is a single sentence there. Read that sentence by itself and say what you have to say, and [fol. 288] then read the next sentence by itself and say what you have to say.

The Witness: The carriers' tariffs do provide for delivery of livestock on their own right of way. They also provide delivery of livestock consigned to Chicago at the Chicago Union Stock Yards, making that point a delivery on their own railroad to the same extent as other locations. Choice is then given to decide where to take delivery of the livestock and those desiring to take it at the Union Stock Yards so indicate.

Mr. Smith: Now, are you going to go ahead, Mr. Rynder, or shall I?

Mr. Rynder: If that answer is satisfactory with you, it is all right with me. You were asking him to agree to two different statements.

Mr. Smith: Go ahead and ask him about the second one. What do you want him to do, quit on the first sentence? I asked him about both of them.

Mr. Rynder: You can quit whenever you please.

Mr. Smith: Let me examine the witness, unless you are taking over the examination in toto. I do not think we ought to break it up this way.

Mr. Rynder: I have done nothing except to offer an objection to a double question. I asked the witness to take each sentence, one at a time. That, I submit, is proper action on my part.

Exam. Carter: Let us proceed, gentlemen.

[fol. 289] By Mr. Smith:

Q. Do you care to criticize as incorrect anything the Supreme Court has said in that opinion that I called your attention to?

A. No, sir.

Mr. Rynder: I object to the question.

Exam. Carter: That is a pretty broad question. We do not even know whether he has read the Supreme Court decision.

Mr. Smith: He said that he did.

Exam. Carter: Just that part of it.

Mr. Rynder: I do not offer any objection. I simply asked the witness to take the two sentences, each of which are separate, and look at them and make up his mind about each one.

Exam. Carter: Do you remember that last question?

Mr. Smith: Let the reporter read it.

Exam. Carter: Read the question, please.

(Question read.)

Mr. Smith: I do not mean "anything in the opinion".

Mr. Rynder: I move to strike both the question and answer there. I think it ought to be done, because I think that last question——

Mr. Smith: I will withdraw it. That is the shortest way to handle that.

Mr. Rynder: Does he mean as to the whole opinion?

Exam. Carter: No. I think he just meant to include what he referred to.

[fol. 290] Mr. Smith: That is right.

Mr. Rynder: It does not so read.

Mr. Smith: Withdraw the question.

Mr. Rynder: I have no objection to the witness going into the two sentences that Mr. Smith called to his attention.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Approximately how many cars of livestock are delivered at the Union Stock Yards by rail in a year?

A. I cannot remember. I have seen figures of the stock yards company. It runs into a considerable amount.

Q. Is it 10,000 or 100,000? Haven't you any idea?

A. It would be closer to 100,000.

Q. Now, I would like to be sure as to the point you are really making about these other facilities. You say you do not know what stock has been offered, or how any stock that has been offered for delivery there is unloaded or handled. Is it your position that these carriers ought to maintain substitute facilities capable of handling these 100,000 cars, if that is the amount?

Mr. Rynder: Wait a minute.

By Mr. Smith:

Q. (Continuing) That is unloaded at the Union Stock Yards?

Exam. Carter: Let him finish his question.

Mr. Smith: That completes my question.

Mr. Rynder: Mr. Tally, you are not to answer any ques-
[fol. 291] tion as to the position of the complainant in this case.

Mr. Smith: Can't I find out, Mr. Examiner, what the point of his testimony is that he gave with respect to these other facilities?

Mr. Rynder: You are asking him conclusions that are properly part of the lawyer's business. He has put in certain facts, insofar as the Examiner has allowed them to go in. He can be cross examined on any of those facts, but he cannot be allowed to state his conclusion as to the duties of the carrier which involves matters of law.

Mr. Smith: I submit it is a fair question.

Mr. Rynder: I direct the witness not to answer.

Mr. Smith: I am going to examine this witness, whether Mr. Rynder is going to tell him not to answer every question or not.

Mr. Rynder: I will tell him every time I think it is proper.

Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

Mr. Rynder: I direct the witness not to answer.

Mr. Smith: I did not catch that.

Mr. Rynder: I said, I direct the witness not to answer.

By Mr. Smith:

Q. You offered a considerable amount of testimony with reference to these other facilities at Chicago. You stated you did not know the amount of livestock that was offered [fol. 292] for handling at these other points or how it was handled, if any. Should we understand from your testimony that in the opinion of Swift and Company these railroads ought to maintain facilities other than the facilities furnished by the common carrier service of the Union Stock Yards, sufficient as a substitute to handle all of the traffic which is now unloaded at the Union Stock Yards?

Mr. Rynder: I direct the witness not to answer the question.

Exam. Carter: You do not desire to disclose whether that is the position of your company or not, is that it?

Mr. Rynder: Mr. Examiner, you can hardly imagine the sorrow I have in my heart, to see a lawyer of Mr. Smith's distinguished ability going beyond the bounds of cross examination and asking for statements of position which only I can state. He has turned an alleged cross examination into a mere argument with the witness.

Exam. Carter: I will sustain the objection.

By Mr. Smith:

Q. Mr. Tally, assuming for the purpose of the question that——

Exam. Carter: I might say this, though, that the Commission would, I am sure, desire as full a disclosure on the part of both parties of not only the facts but the contentions and positions taken by the parties, as is possible.

Mr. Rynder: Well, we are getting the facts now. As far [fol. 293] as our side is concerned, it will get our contentions in the brief, and I am sure there will be no contention there pro or con upon whether these railroads should establish substitute facilities. I can say that now. There will be a perfectly blank page on that, because it is not at all relevant to the case.

Mr. Smith: I do not know why you offered that testimony, but you offered it.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Assuming for the purpose of the question that facilities sufficient to handle the volume of traffic unloaded at the stock yards were maintained, stand-by facilities, that somebody has to for these idle facilities, I will ask you whether Swift and Company is willing to have its line haul rates increased sufficiently to maintain such facilities.

A. Well, the measure of freight rates——

Mr. Rynder: Now again, I think that calls for a conclusion of the witness and an opinion, whether Swift and Company is willing to have its freight rates increased to cover what it conceives to be the carrier's duty under its line haul rate.

Mr. Smith: Apparently you just offer testimony and *then if anybody attempts* to inquire about it, or about its effect, it is asking for an opinion or a conclusion, or a position that the witness should not be asked to give.

Mr. Rynder: I stated our position this morning.

[fol. 294] Mr. Smith: I will not press it.

Mr. Rynder: I stated our position on that very fully this morning in connection with the $3 charge. It would be hard to state it again without mere repetition.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Are you acquainted with the facilities that are now and have been for years past used for handling direct shipments at the Union Stock Yards to Swift and Company?

A. Well, the facilities for handling direct shipments of livestock are the same as for any other livestock.

Q. Now, how is the livestock—do you know how the livestock is handled that comes in consigned directly to Swift, and the route over which it is driven to Swift and Company's plant?

A. Not the details of it, no.

Q. You do not know that?

A. No.

Mr. Smith: Is Mr. Tally going to be available throughout the hearing for further questions, if I would want to recall him, Mr. Rynder?

Mr. Rynder: Yes, sir. At any time.

Mr. Smith: I think that is all for the present.

Exam. Carter: Is there any redirect examination?

Mr. Smith: Just a moment. I do have another question or two.

Exam. Carter: Very well.

[fol. 295] By Mr. Smith:

Q. You had something to say about scales maintained by Swift and Company.

A. Yes, sir.

Q. How is the weighing of direct shipments consigned to Swift and Company handled now?

A. They are not being weighed, because there are no direct shipments coming through the stock yards. The scale is there and has been tested recently by the Western Weighing and Inspection Bureau, and is ready at all times to be used.

Q. Do I understand that your company, who brings this complaint, is not now getting any direct shipments of livestock at the Union Stock Yards?

A. I would not say 100 per cent "not any", but not in the volume they did at one time.

Q. Let us talk about those they do receive. How are they weighed?

A. Well, under the method of handling now we are forced to take them, subject to the stock yards company yardage charges, and they are handled through that same medium as any other shipment.

Q. I think I understand reasonably well your general position in this case. If we can just talk about weighing these animals for a moment or two, perhaps we can get the facts. Who weighs the animals that come in directly consigned to Swift and Company?

A. Do you mean through the Chicago Union Stock Yards?

Q. Right.

A. If there are any they would be weighed on the stock [fol. 296] yards company scales.

Q. Do you know whether there are any or not?

A. I do not believe there are.

Q. How long since there have been some?

A. Oh, of any consequence, I would say within the last two years.

Q. How have they been weighed during that period, and by whom?

A. During the last two years?

Q. Yes.

A. If there were not any, they would not be weighed.

Q. Right. And those that were, if any?

A. If any——

Q. Let me put it this way: do you know how these animals have been handled with reference to weighing in the last three years, or the last two years if your prefer? If you do not know, just say so.

A. I do not know.

Mr. Smith: All right. That is all.

Exam. Carter: I have one question.

By Exam. Carter:

Q. I may have understood your testimony incorrectly, but I understood you to say on direct shipments of Swift and Company, they were weighed on Swift and Company's own scales. Is that correct?

A. No. I said, Mr. Examiner, that we have available scales for the purpose of weighing direct shipments.

[fol. 297] Exam. Carter: I may have misunderstood you. I just wanted to clarify that. Have you any other questions, Mr. Smith?

Mr. Smith: None.

Exam. Carter: Have you any redirect, Mr. Rynder?

Mr. Rynder: I have just received a document I asked for yesterday, because I wanted to put in a typical bill of lading upon one of those direct shipments to Swift and Company. Of course, the printed part of it I may say is the ordinary livestock contract. But, I would like to show it to counsel—and I might say, it should have been part of my direct, except they did not get it down in time. In order that there may be copies I would like to offer that tomorrow morning, not on cross examination but as part of the direct examination.

Mr. Smith: What is it you are asking me, Mr. Rynder?

Mr. Rynder: I am simply showing it to counsel and saying that I am a little bit out of order in offering it.

Mr. Smith: You have not closed your direct case yet, as I understand it. You will have another witness.

Mr. Rynder: I want to offer it by this witness.

Mr. Smith: I will not object to its being offered in the morning by this witness. I am not saying I will not object to its admission, but I will not object on the ground it should

have been offered before cross examination, or anything like that.

Mr. Rynder: Very well.

[fol. 298] Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will adjourn at this time until tomorrow morning at 10 o'clock.

(At 3:30 P. M. Central Standard Time, on June 1, 1938, adjourned until 9 A. M., Central Standard Time, June 2, 1938.)

[fols. 299-300] Chicago, Illinois, June 2, 1938.
9 o'clock A. M. Central Standard Time.

Before: Paul O. Carter, Examiner, Interstate Commerce Commission.

Hearing resumed pursuant to adjournment.

Appearances: As heretofore noted.

Exam. Carter; Come to order please, gentlemen. Mr. Tally, you were on the stand yesterday afternoon, and I do not think you had been excused. I just want to see if my understanding of some of your testimony is correct.

G. F. TALLY resumed, having been previously sworn, testified further as follows:

By Exam. Carter:

Q. I think you testified that on the direct shipments which Swift and Company has received at the Union Stock Yards in recent years, the stock has been driven from the unloading or the holding pens by employees of the stock yards company, but that so far as the future is concerned, Swift and Company would be prepared to drive that stock itself from those pens to its packing plant, is that correct?

A. No. In the past direct shipments of livestock consigned to Swift and Company received at the Union Stock Yards were accepted by Swift and Company employees at the chutes and at the holding pens and driven by them to Swift and Company locations.

[fol. 301] Exam. Carter: Did you not understand him to testify differently yesterday?

Mr. Smith: No, I did not, Mr. Examiner.

Exam. Carter: I must have misunderstood, then. I wanted to get that straight.

Mr. Smith: I have understood, and I do now understand that on these direct shipments the employees of the stock yards company do not now and never have driven the animals to the packers plants. The situation is that either the packers employees take them from the unloading chutes and drive them to the plants, or the stock yards employees take them out of the unloading chutes and drive them to holding pens and then thereafter the employees of the packers drive them from the holding pens to the packers plants.

The Witness: That is correct, yes.

Exam. Carter: I just wanted to straighten that out. Somehow I got a different impression yesterday. You may proceed.

By Mr. Rynder:

Q. Now, Mr. Tally, has there been a reason for both conditions? First, as to shipments arriving during the day, have your employees been driving the shipments from the unloading pens?

A. They have, yes, sir.

Q. Have you been refused admission to the unloading pens during certain night hours prescribed by the stock yards company?

A. Yes, sir. They have permitted us to take the livestock [fol. 302] at the unloading chutes, I believe, between the hours of 7 A. M. and 6 P. M. Beyond 6 P. M. and up to 7 A. M. they have denied us the right to take them at the unloading chutes and they have placed them in holding pens; at that point we then take them and drive them to our locations.

Q. Has the practice arisen out of the necessities that were placed upon you? I mean this: if trains were coming in during the night and early in the morning, at a time when you were denied admission to the unloading chutes, up to, say, 7 A. M., if that is the time, was the placing of that livestock in the holding pens by the stock yards a necessity due to the fact that other trains were coming in and the other pens had to be made available for incoming shipments?

Mr. Smith: Read that question please, Mr. Reporter.

(Question read.)

A. That is my understanding of the reason for it, yes.

By Mr. Rynder:

Q. If you were given access to the unloading pens at all hours of the day, has it been your intention to remove them, to remove the livestock at the exact time of arrival?

A. Yes, sir. That would be our purpose if we were allowed to take them at any time of the day; we would take them from the unloading chutes and drive them to our plant.

Mr. Rynder: Is that all on that?

Mr. Smith: No. I want to interrogate the witness on [fol. 303] that. That is something new to me. I had not heard that before. I think we want the record to be perfectly clear about it.

By Mr. Smith:

Q. You say that in the past you have made efforts to go immediately to the unloading pens as soon as a car was unloaded into those pens and to obtain the animals, and the yards company has refused to permit you to have those animals at the unloading chutes for some reasons of their own; and it is because of that that you have permitted those animals to be taken to and remain in holding pens until some time after 7 o'clock? Is that what you are saying now?

A. Yes, sir. We served notice on the railroads and the stock yards company that we were ready and willing to accept the livestock at the unloading chutes. They denied us that privilege and indicated by letters shown in exhibit 2 that they would consider they had made such demands on them, on each and every shipment.

Q. That does not sustain what you have been testifying to at all, Mr. Tally. Those letters related to this whole problem, to all of the stock, regardless of when it was received, is that not correct?

A. That is right.

Q. There was nothing said in any of that correspondence that had particular or limited reference to livestock arriving before 7 o'clock, was there?

A. It did not have any dealings with any particular time.

[fol. 304] It dealt with all livestock of that nature arriving direct.

Q. Exactly.

A. But they did give it to us at the unloading pens during the day time.

Q. As you know, Mr. Henkle is going to be here tomorrow. I want this record in such shape that he can be definitely advised what your position is with reference to this traffic that has been arriving before 7 o'clock. I have asked you what had happened with reference to that situation before 7, and you referred to this correspondence. It simply relates to all traffic. Are you telling the Commission that in the past you have attempted to go down to the yards and take this livestock that was unloaded before 7 o'clock out of the unloading chutes and have been denied access to the unloading chutes until 7 o'clock?

A. We were denied the right to take that livestock from the unloading chutes except at their wishes and that was during the day.

Q. Now, Mr. Tally, will you tell us about——

Exam. Carter: Just a moment, please. What was the last part of that answer, Mr. Reporter? Read it please.

(Answer read.)

Exam. Carter: What do you mean by that last phrase?

The Witness: Their wishes were during the day.

By Exam. Carter:

Q. In other words, they permitted you to do it during the day?

[fol. 305] A. No. They allowed us to do it during the day, but they forbid us doing it at night.

Exam. Carter: That is what I said.

By Mr. Smith:

Q. Was that demand made in writing or orally?

A. The demand was made in writing.

Q. Where is the writing in which it was made?

A. In the letters shown by exhibit No. 2.

Q. Is there anything in those letters that relates to livestock arriving before 7 o'clock as distinguished from livestock arriving after 7 o'clock?

A. No. That dealt with all livestock.

Mr. Rynder: But it said, if you will look at the exhibit, that we were ready, willing and able to take them at all hours of the day or night.

Mr. Smith: I understand, Mr. Rynder. This witness has injected the thought, that is new to me, that some distinction is made and that even though they have been ready to take this livestock before 7 o'clock at the unloading chutes, they were not permitted to do it. I want to find out about that. He says he made that demand in writing, but that is simply these letters that are included in exhibit 2.

Mr. Rynder: You say "simply these letters". We think they are very important.

Mr. Smith: You think they are very important. I understand your position.

[fol. 306] Exam. Carter: Proceed, gentlemen.

By Mr. Smith:

Q. That is the demand you are talking about?

A. Yes, sir.

Q. Now, was the position of the stock yards, with reference to taking the animals at the unloading chutes prior to 7 o'clock in the morning—was that made in writing, or orally?

A. They did not designate a time. They denied us the right to take them at the unloading chutes or any other place, under the provisions of our letter.

Q. They did not ever deny you the right to take them, except in the event you refused to pay this yardage charge; that was what was involved in the letters, was it not?

A. Yes, but it is my understanding they denied us the right to take the livestock at the unloading chutes except between the hours of 7 A. M. and 6 P. M.

Q. What is that understanding based on? That is what I want to know.

A. Information that is given to me.

Q. By whom?

A. Our hog buyer.

Q. Mr. Reneker?

A. Yes, sir.

Mr. Smith: I move to strike the testimony of this witness which relates to taking of animals before 7 o'clock in the morning, or any position of the stock yards with respect [fol. 307] thereto, as hearsay.

Mr. Rynder: It is a question of just where you strike it. Counsel has asked some questions, and the Examiner has asked some questions there——

Exam. Carter: It is apparent that his testimony relating to the alleged refusal of the yards company to allow Swift and Company to take the animals prior to 7 A. M. is based on hearsay. That is the point.

Mr. Smith: Yes.

Exam. Carter: Your motion is to strike that evidence?

Mr. Smith: Yes.

Exam. Carter: I will grant that motion.

Mr. Rynder: Are you through with Mr. Tally, Mr. Smith?

Mr. Smith: I think I am, on that point, now, yes.

Mr. Rynder: Mr. Tally, I want to ask you this question:

By Mr. Rynder:

Q. Regardless of any letters, do you know whether there is a general rule of the stock yards company that they will not let anybody into those unloading pens during those night hours?

A. That is my understanding, yes.

Q. Commission men or otherwise?

A. Yes, sir.

Q. So that in being denied this right, it was not something specifically aimed at you, but it was a practice of the stock yards applied to all receivers of livestock whether [fol. 308] directs, consignments to commission men, or otherwise?

Mr. Smith: Now, Mr. Rynder, when Mr. Henkle comes here tomorrow morning, he may say that is the rule and has been the rule for years. I do not know that it is not, but this witness does not have any information about it. It is pure hearsay. I move to strike the answers he has just given to Mr. Rynder.

Exam. Carter: Mr. Rynder, there is a motion to strike that testimony, as to that rule, on the ground that Mr. Henkle will be here tomorrow and will be able to testify as to whether such a rule exists.

Mr. Rynder: In my own mind I am just a little uncertain as to what testimony should remain in.

Mr. Smith: Just a moment, please.

Mr. Rynder: There are some answers to the Examiner, I suppose, that are still in the record.

Exam. Carter: They are still in the record, yes. It is not physically stricken.

Mr. Rynder: May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. I will grant the motion to strike Mr. Tally's answers. Mr. Henkle, who is general manager of the stock yards company, will be here tomorrow morning, and he should know whether such a rule exists. I will grant Mr. Smith's motion to strike from the [fol. 309] record Mr. Tally's answers to the questions last propounded by Mr. Rynder, to him. Is there any further cross examination of this witness?

Mr. Smith: I have a question or two.

By Mr. Smith:

Q. In the last several years do you know whether Swift and Company has gone to the unloading chutes to demand possession there of all animals unloaded into the unloading chutes after 7 o'clock?

A. No. I do not know definitely whether they have done it in every instance.

Q. You do not know?

A. No, sir.

Q. So you do not know whether or not this rule that you spoke about exists; you do not know what Swift and Company has done and is now doing with respect to taking possession of the animals regardless of when they arrive?

A. Only from the general standpoint.

Q. I see.

A. Not specifically.

Mr. Smith: Mr. Examiner, a good deal has been said about these letters. This is a rather bulky document. I have not read it clear through, and I am sure the Examiner has not. However, referring to a letter written by Mr. Leonard, president of the yards, to Swift and Company, dated May 24, 1933, the second paragraph reads as follows: "This company"——

Mr. Rynder: Please give me the page, Mr. Smith.

[fol. 310] Mr. Smith: Page 105. "This company is willing to make delivery of all such shipments to you at the pens into which said shipments are unloaded from the cars,

but you are correct in your understanding that the removal of said shipments from these pens over the property of this company will not be permitted unless you then pay the yardage charges or agree to pay them in the future." He does not say when they can get them, but he says they can get them at the unloading chutes.

Mr. Rynder: Well, I might say, Mr. Examiner, that so long as we are required to use the alleys and runways of the stock yards as we have been since the first letter was sent in, it has not been a matter of importance to us whether we were allowed to send our men in or not. Whatever we did, we were going to pay this charge.

Exam. Carter: Is there any further cross examination?

Mr. Smith: That is all.

Exam. Carter: All right, Mr. Rynder. Do you have any further questions of this witness?

Mr. Rynder: Since Mr. Smith has called attention to Mr. Leonard's letter on page 105 of exhibit 2, I desire to call attention to our letter to Mr. Leonard on page 106. To save reading the whole letter, I will start at the bottom: "Please be advised that we are willing, from time to time on and after May 25, 1933, to pay your yardage charges on such stock if such charges are received by you as being paid [fol. 311] under protest and in mitigation of damages, and also if it is understood that with respect to each and every of such shipments a physical demand for delivery and the right to remove such stock without payment of such yardage charges is considered as having been made and refused, and that such demand would actually have been made but for your advice that the same would be continuously refused." Then Mr. Leonard answers with the letter that Mr. Smith read: "It is also agreeable to us that it be understood that with respect to each and every of said shipments, a physical demand for delivery and for the right to promptly remove such stock without payment of such yardage charges is to be considered as having been made by you as soon as the stock is unloaded and refused by this company", and so forth.

Exam. Carter: Have you any further questions of Mr. Tally, Mr. Rynder?

Mr. Rynder: I have some redirect examination, when the time comes.

Exam. Carter: Mr. Smith has finished.

Mr. Rynder: Mr. Reporter, mark this as the next Complainant's Exhibit please.

(Complainant's Exhibit No. 19 marked for identification.)

Mr. Rynder: I had asked yesterday that I be permitted to introduce a bill of lading, this being in the nature of direct testimony.

Exam. Carter: You may proceed.

[fol. 312] By Mr. Rynder:

Q. Mr. Tally, I hand you a document which has been identified as Complainant's Exhibit No. 19, and ask you if you recognize it,

A. Yes, sir.

Q. Please state what it is.

A. It is a livestock contract covering a movement of 112 hogs from Cherokee, Iowa, on October 30th, 1935, made by Swift and Company to Swift and Company, Chicago, SLX car 70984.

Q. Is that a bill of lading for one of the shipments we have been here referring to as directs?

A. Yes, sir.

Q. Is this taken from the files of your company?

A. Yes, sir.

Q. And are those documents part of the transportation records which are under the general jurisdiction of yourself and your department?

A. Yes, sir.

Q. Referring generally to the matter printed on both the front and back of the uniform livestock contract, are those conditions and so forth the same as those prescribed some years ago by the Commission as a uniform livestock contract, now embodied in the Consolidated Classification?

A. Yes, sir.

Q. Is the Union Stock Yard and Transit Company mentioned anywhere in this livestock contract?

[fol. 313] A. No, sir.

Q. Is it mentioned even as a destination point?

A. No, sir.

Q. Have you directed the carriers with respect to this shipment to bring the livestock to the Union Stock Yard and Transit Company?

A. No, sir.

Q. Is this the form in which all bills of lading to you on all direct shipments are made out, unless there is some error?

A. Yes.

Q. I mean, unless there is some error and the bill is made contrary to your instructions.

A. Yes, sir.

Q. Was the livestock on this bill of lading tendered for delivery at the Union Stock Yards in Chicago?

A. It was.

Q. Were you required to pay yardage charges upon it?

A. Yes, sir.

Q. Have you obtained from your accounting department a copy of the accounting records in connection with this car?

A. Yes, sir.

Q. What do they show as to the payment of freight and yardage charges?

A. We paid $13.44 yardage charge. That is on the basis of 112 hogs at 12 cents per hog, yardage charge. That was [fol. 314] paid under protest.

Q. Did I understand you to say this bill of lading is typical of each direct shipment of livestock consigned to Swift and Company in Chicago?

A. Yes, sir.

Q. I mean, particularly in that there is no designation that it shall be delivered through the Union Stock Yard and Transit Company?

A. Yes, sir.

Mr. Rynder: The document which I have handed to Mr. Tally and had identified, I offer in evidence as Complainant's Exhibit 19.

Mr. Smith: May I see the original, please?

Mr. Rynder: Yes.

Mr. Smith: What is this document, please? It bears the stamp "copy". Is it an original duplicate, or what is it?

The Witness: It is a copy of the original livestock contract.

Mr. Smith: The original is where?

Mr. Rynder: I want to ask Mr. Tally one more question on direct, if I may, Mr. Smith.

Mr. Smith: All right.

By Mr. Rynder:

Q. Do you know whether it is the practice of the railroads, defendants in this case, to bring the shipments and place them at the Union Stock Yards when there is no desig-
[fol. 315] nated delivery shown on the bill of lading, as in exhibit 19?

A. Yes. That is the practice.

Q. They do not place them at one or another of the outlying stations that have been mentioned yesterday or the day before?

A. No, sir.

Mr. Rynder: That is all, Mr. Smith.

Mr. Smith: I haven't any objection to this offer on the understanding that that is a true copy of the original. As I understand it, it is a duplicate original made at the time the original was made. Is that true?

Mr. Rynder: I understand that that is all, Mr. Smith, we get as the consignee.

By Mr. Smith:

Q. Now, as I understand you, Mr. Tally, you have been receiving shipments——

Exam. Carter: Just a moment, please. Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record, Mr. Reporter. Proceed, Mr. Smith.

By Mr. Smith:

Q. This purports to carry the signature of "Bixby". Was that signed by Bixby as a carbon copy, or do you know about that?

Mr. Reneker: I could identify his signature if it is on there, Mr. Smith.

Mr. Smith: Have you any objection to having Mr. Reneker do that?

[fol. 316] Mr. Rynder: None.

Mr. Reneker: That is Bixby's signature.

Mr. Smith: Who is Bixby?

Mr. Reneker: He was our hog buyer at the time this shipment was made at Cherokee, Iowa.

Mr. Smith: I see.

By Mr. Smith:

Q. You have received shipments billed in that manner at the Union Stock Yards for how many years?

A. Several years.

Q. Do you know how many years?

A. No.

Q. And on shipments so billed, you have been paying the yardage charges as you testified?

A. Yes, sir.

Q. Now, is it your position that under this contract the railroads could have delivered that car—the Illinois Central could have delivered that car on a team track——

Mr. Rynder: Do not answer that question.

By Mr. Smith (continuing:)

Q. —in Chicago, and you would have accepted it?

Mr. Rynder: Do not answer that question. I will state the position of this company.

Mr. Smith: I submit that is a proper question.

Mr. Rynder: I direct the witness not to answer. I will state the position.

[fol. 317] Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

Mr. Rynder: I will state the position, at the proper time, and I have a right to.

Exam. Carter: I do not think that is asking for the policy of the company, as I understood the question. I may have misunderstood it.

Mr. Rynder: He asked, "Is it your position". The witness is taking no position in this case.

Exam. Carter: Let me hear the question again, please, Mr. Reporter.

(Question read.)

Mr. Smith: Mr. Examiner, just let me say a word. Either there is an understanding between the railroad and the consignee that this traffic will be delivered at the Union Stock Yards, with all that that involves, or the railroad may, at its pleasure, deliver that car on its team track and the shipper be willing to accept it there. Let us find out which it is.

Mr. Rynder: You will not find out from this witness.

Mr. Smith: I think this is one instance in which the Examiner should require the witness to answer the question.

Mr. Rynder: I have offered the document in evidence. I am surprised at the tenacity of my distinguished friend, for whom I have the utmost respect, in constantly asking the witness to state the purpose for which testimony is offered, [fol. 318] and the position of the complainants. If we were trying a burglary case and I called a witness who said he was at State and Jackson last night at 9 o'clock, and I asked what he saw, certainly counsel for the defense cannot say to the witness, "For what purpose is that testimony offered?" Neither can it be done here. It is a piece of testimony that fits into this case. The witness does not know the purpose for which I am introducing it.

Exam. Carter. Let me ask you this—I beg your pardon. Go ahead.

Mr. Rynder: So that the Examiner will not be completely in the dark, I will say that in our letter of May 16th, 1933, to all the carriers, this was stated: "On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yard and Transit Company of Chicago, Illinois (other than delivery of such livestock to the Union Stock Yard and Transit Company of Chicago, Illinois, as your agent for unloading and delivery to us) will constitute a conversion of our property."

Exam. Carter: Read me the question again please, Mr. Reporter.

(Question read.)

Mr. Rynder: With the notice that it would constitute a conversion of our property, the railroad has made delivery under these bills of lading consigned to nowhere in Chicago, [fol. 319] and the purpose of it will be contained in my brief.

Mr. Smith: Mr. Rynder, I do not think you want to engage in any concealment here of the situation. However, I think in what you are attempting to do, unwittingly you are doing that very thing.

Mr. Rynder: I think I have shown you the whole thing.

Mr. Smith: The inference which you are going to undoubtedly attempt to draw is that you simply bill this stuff to Chicago.

Mr. Rynder: Yes.

Mr. Smith: And you are just willing to take it any place in Chicago that we want to deliver it. You will say that we insist on taking it down to the Union Stock Yards, although we have many team tracks in Chicago, and that we do that for our own convenience and against your wishes. Now, if that is a fact, it is perfectly proper for the record to so show.

Mr. Rynder: There are many deliveries——

Mr. Smith: Let me finish, please. But, on this traffic that is billed to Chicago, if you are unwilling to accept it on team track delivery, so that although this says "Chicago", actually there is an understanding between the parties that it will be delivered at the Union Stock Yards, the record ought to show that, the only difference being—

Mr. Rynder: That is not a fact. There are many deliveries we can make around this city where the trucking cost to [fol. 320] us would be from one-third to one-fourth of the yardage charge at the Union Stock Yards. We know that from our own experience.

Mr. Smith: I want the record to show, when you say you have a contract with the carrier to bring livestock into Chicago, whether that contract is to take it to the Union Stock Yards, in fact, or whether you are willing to accept delivery of that stock whenever it is billed to Chicago by your buyers, on a team track. I want to know that, and I think the record ought to show it.

Mr. Rynder: It has been over our protest ever since that letter has been written. It is not up to us to advise the carriers what they shall do, when we advise them that a particular delivery under particular circumstances is a conversion of our property.

Mr. Smith: I am asking you to advise the Commission——

Exam. Carter: Listen, Mr. Smith——

Mr. Smith: Mr. Rynder, I want you to advise the Commission as to what you——

Exam. Carter: Just a moment, please.

Mr. Rynder: We are presenting the facts in this case, and I will——

Exam. Carter: Listen, gentlemen: I desire to ask a question myself. Mr. Reporter, read that last question of Mr. Smith's, please.

(Question read.)

[fol. 321] Exam. Carter: Let me reframe that question a little differently, myself.

By Exam. Carter:

Q. Under this livestock contract and under the applicable tariffs, could the railroads have delivered that car at either the Union Stock Yard and Transit Company or some other point on their line in Chicago?

A. Yes, sir.

Q. They could have?

A. Yes, sir.

Q. Would you have accepted delivery of that car at a point other than the Union Stock Yard and Transit Company?

A. We would have.

Mr. Smith: I did not catch that.

The Witness: We would have.

By Mr. Smith:

Q. And will you now?

A. If it is so tendered to us, yes, sir.

Q. On any billing to Chicago?

A. If it is tendered to us billed in that way, we would necessarily have to.

Q. Is Swift and Company an industry on the Illinois Central Railroad in Chicago, through the operation of the so-called switching tariff?

A. Yes, it is.

Q. Is it the effect of the tariff that you can require a Chicago delivery to be made at the yards?

[fol. 322] A. Yes, but at a different freight rate; at our plant in the yards.

Q. Now, I mean at the Union Stock Yards. Let me put it this way: under such a shipping contract as evidenced by exhibit 19, which shows the destination as Chicago, does that cover a delivery at the Union Stock Yard and Transit Company under the switching tariff?

A. Chicago means either one.

Q. I see.

A. A team track, or the Union Stock Yards.

Q. Yes.

A. Both designated as delivery points.

Q. So that under this contract, or under such a contract, you can require delivery at the Union Stock Yards, can you not?

A. Yes. We could ask for delivery at the Union Stock Yards under the applicable tariffs.

Q. And similarly you could ask for delivery at a team track?

A. Yes, sir.

Q. They would both be covered by the terms of this tariff?

A. Yes, sir.

Q. For how many years have you accepted delivery of stock under contracts of the type shown by exhibit 19 at the Union Stock Yards?

A. Many years.

Q. Has any car ever been tendered to you by the rail-
[fol. 323] road, the Illinois Central Railroad, or have you ever accepted delivery at a team track?

A. Not to my knowledge.

Q. During all of that period?

A. Yes, sir.

Mr. Rynder: Now, that is a double question.

Exam. Carter: What was the last answer?

(Answer read.)

Exam. Carter: That really should be "No, sir."

Mr. Rynder: He says, has it been tendered or accepted. Of course, if it were not tendered, it could not be accepted. I want the witness to answer both questions: first, was any shipment ever tendered to you at the team track?

The Witness: Not that I know anything about.

Mr. Rynder: Then you had nothing to do with the acceptance of such shipments?

The Witness: No, sir.

Mr. Smith: I think that was superarrogation on my part.

Mr. Rynder: No, Mr. Smith. I recognize your great ability in throwing in double questions that require a lowly mind like mine to watch.

Mr. Smith: You are just a skeptical fellow, Mr. Rynder.

Exam. Carter: Are there any further questions of Mr. Tally?

Mr. Smith: Yes.

[fol. 324] By Mr. Smith:

Q. As I understand it, it is your position that where there is——

Mr. Rynder: Do not answer the question.

By Mr. Smith:

Q. (Continuing:) —a billing such as exhibit 19, you have an option either of accepting delivery at a team track or at the Union Stock Yards?

Mr. Rynder: Do not answer that question. I am going to state the position.

Exam. Carter: He has already stated under the tariff he thinks he can accept delivery at other points. That does not differ a whole lot in substance, I think, from your question. I will sustain the objection.

Mr. Smith: Mr. Examiner, I understand this situation to be this: these people have always wanted delivery of this livestock at the Union Stock Yards, subject, however, to their condition, urged—from the date they began to urge the condition—that it should be delivered at the Union Stock Yards without the imposition of a yardage charge. As best I can understand it, and on that basis, the basis of my understanding, that is their position. It seems to me that the effort being made here by inference is to give the impression that that is not the fact at all; that they want something more than simply to be relieved of these yardage charges; that this traffic has been handled to the Union Stock Yards at Chicago, not because of any desire of theirs to have it there, but simply at the convenience of the carriers, [fol. 325] rather than having it delivered on a team track. Now, as I have understood it, that is their position. I will be glad to have Mr. Rynder make it clear, or anybody else who wishes to. Now, he does not put on a witness who can state what the attitude of his company is. The questions all have to come to him. I would be glad if he would state whether it is not the position of Swift and Company that they want this traffic delivered to the Union Stock Yard and Transit Company relieved of any charge against them, for yardage charges; or whether they are saying now that they want shipments delivered or consigned to Chicago to be sent to the team tracks of the carriers regardless of whether or not the yardage charge is to apply at the stock yards. I think we ought to have that on this record.

Mr. Rynder: The fact is we have not prepared data to show as to what it might cost us to receive it from any team track. I assume if delivered on a team track there would have to be at least some way of getting it out of the car. I understand the carriers are doing that very thing now, for certain shippers in certain of the yards near the stock yards. They are placing cars on team tracks so these shippers may avoid the yardage charge.

Mr. Smith: We are going to show that.

Mr. Rynder: And in such a situation, the truck can back right up to the door of the car and the animals can move directly from the car into the truck. Now, we simply put [fol. 326] the carriers on notice that we would consider from a certain date any such delivery as they have made a conversion of our property. Voluntarily they have gone on and done it. They have not said "Will you take it on team track A", or "Will you take it on team track B". I would like to say to you as a practical answer to that question, we have been shipping to the point where it has reached almost 100 per cent,—but not quite—to a point three miles from our packing plant in order to escape this yardage charge and thereby bring the stuff in on trucks. Nevertheless, the carriers have been delivering their shipments, so billed, to the Union Stock Yard and Transit Company of Chicago.

Mr. Smith: Mr. Rynder, you said yesterday you had been able to beat this yardage charge, but you are seeking here to get the yardage charge removed.

Mr. Rynder: Yes.

Mr. Smith: Is it your purpose by this complaint to have that yardage charge removed if it is unlawful, so that you can receive all of your shipments that are billed in the future, as in the past, at the Union Stock Yards?

Mr. Rynder: I think in view of the evidence already gone in here, the yardage charge does not even exist.

Mr. Smith: What?

Mr. Rynder: I say, I think the yardage charge does not even exist. I think—we have paid it under protest because [fol. 327] we could not get possession of our animals without paying it, but I do not think it even exists, in view of the loading and unloading tariff filed with the Interstate Commerce Commission plus the transportation charge, which it happens was not filed with the Interstate Commerce Commission, but I do not think that would make a

great deal of difference; if the transportation charge happened to be there and was not filed with the Interstate Commerce Commission, it is, nevertheless, a transportation charge. I will not go back and discuss again the Strauss and Adler case I mentioned to you the other day, but in a very rough way of speaking, I think that for the period of the statute of limitations we have been overcharged to the extent of the line haul rate plus $3 a car. That is one of the propositions.

Mr. Smith: Is it your contention, Mr. Rynder, that you are not required lawfully and under any proper tariff to pay this yardage charge?

Mr. Rynder: Oh, we have had to pay it.

Mr. Smith: Yes, you have had to pay it; but on your hypothesis, you have had to pay it, and it is an overcharge and one not lawfully applicable under any lawful tariff?

Mr. Rynder: That is right.

Mr. Smith: On that hypothesis, from the standpoint of Swift and Company, what delivery is meant by a contract which names Chicago as the destination?

Mr. Rynder: We will leave that up to the carriers, after [fol. 328] the notice we have given you.

Mr. Smith: I am asking for Swift and Company's position on that.

Mr. Rynder: That is our position.

Mr. Smith: You said you had alternatives.

Mr. Rynder: I am stating our position.

Mr. Smith: You said you had alternatives.

Mr. Rynder: I am stating our position, that after having had our order buyer issue a bill of lading of that kind, and after the notice that is given to the carriers, our position—underscore that, please—our position is we will leave it up to the carriers to say what they want to do about it. That is our position.

Mr. Smith: Whatever they decide to do, you will accept without protest?

Mr. Rynder: I am speaking of past shipments. We are asking here——

Mr. Smith: What has happened in the past cannot be changed now.

Mr. Rynder: No, but it may have some bearing on reparation. What our position in the future will be will depend upon what the Commission decides in this case.

Mr. Smith: I see.

Mr. Rynder: I take it if the Commission decides against us, we will not bring any stock into the Union Stock Yards.

[fol. 329] Mr. Smith: Well, I probably ought to apologize for all of this. I suppose acceptance of the stock at the stock yards indicates where you want it.

Mr. Rynder: No. It indicates where it came over our protest.

Mr. Smith: You took it, evidently.

Mr. Rynder: Yes, we took it.

Exam. Carter: Are there any further questions of this witness?

Mr. Rynder: Well, I did not really have a chance to go back yet. I want to ask Mr. Tally a few questions on redirect.

Exam. Carter: Very well.

By Mr. Rynder:

Q. Mr. Tally, are you familiar with the date of the hearing in the Hygrade case, Docket No. 24375, before the Commission?

A. Yes. It was heard at Chicago, December 21, 1931. It opened on that date.

Q. I hand you what purports to be a copy of the Commission's decision and ask you the date of that decision.

A. The decision says it was decided July 25, 1933.

Q. Did Rule 12 of the Union Stock Yard and Transit Company, which we have frequently referred to—strike that question. Was Rule 12 of the Union Stock Yard and Transit Company tariff which we have referred to made effective after that decision?

A. It was, yes, sir.

[fol. 330] Q. To your knowledge was there any such rule in effect at the time of the Hygrade decision—at the time of the Hygrade hearing or decision?

A. No, sir, there was not, to my knowledge.

Q. Mr. Tally, I understood Mr. Smith to ask you yesterday several questions as to the shortest possible egress to the street.

A. Yes, sir.

Q. You replied, referring to a map.

A. Yes, sir.

Q. You are not insisting upon any particular egress to a public street, are you?

A. No, sir.

Q. But only upon one that the carriers may designate, according to their—well, any one the carriers may designate regardless of condition?

A. Yes, sir.

Q. Or of the exact points?

A. That is correct.

Q. Mr. Tally, I understood you to say yesterday in answer to one of Mr. Smith's questions, that the viaduct eastbound from the unloading chutes running over Halsted Street is the property of the Union Stock Yard and Transit Company.

A. Yes, sir.

Q. Are you certain of that?

A. I do not know definitely who owns it.

[fol. 331] Mr. Smith: Raise your voice a little bit, please.

The Witness: I do not know definitely. I understood that was their property.

By Mr. Rynder:

Q. Did you hear Mr. Kidwell's testimony to the effect their property ended at the east——

A. I was here; I did not hear his testimony.

Q. —at the west side of Halsted Street?

A. I was here.

Mr. Smith: Why cross-examine this witness? Why not go back to the engineer, and let us get the fact about it.

Mr. Rynder: I want to find out if in making that statement he knew or did not know.

Mr. Smith: You are attempting to impeach your own witness. We have accepted him as being qualified to give this testimony. You are not in a position to impeach him.

Mr. Rynder: That is not anything I brought out on direct examination. I am not impeaching him.

Mr. Smith: You are impeaching him on that point. That is cross-examination, and I object to it. I do not object to having the fact shown by somebody who knows it, and this witness knows it, as far as you are concerned, because he is your witness.

Mr. Rynder: He was not my witness upon that point, because I asked him nothing about it on direct examination. The cross-examination upon that point went outside of the direct examination, Mr. Examiner.

[fol. 332] Mr. Smith: All right. I will withdraw my objection.

Mr. Rynder: I asked him nothing about the ownership of that piece of property.

By Mr. Rynder:

Q. All I want to ask you now, Mr. Tally, is whether you have made any investigation to determine the ownership of the viaduct.

A. No. I have not made any investigation.

Exam. Carter: Mr. Tally, we cannot hear you.

The Witness: No. I have not made any investigation.

By Mr. Rynder:

Q. Do you know the ownership of that viaduct?

A. Not definitely, no, sir.

Q. You do not know it definitely, you say?

A. I do not know it at all.

By Mr. Smith:

Q. You do not know that at all?

A. No, sir.

Q. Why did you say yesterday you did?

A. I said it was my understanding.

Mr. Smith: Well, when it comes to differentiating between your understanding and what you know, that is a philosophic question. I will not go into it.

By Mr. Rynder:

Q. Mr. Tally, referring to the questions and answers—or rather, the answers you gave to Mr. Smith about an egress at the west end of the loading chutes, which I believe would lead immediately to Packers Avenue and thence north to 39th Street, or south as the case might be——

[fol. 333] A. Yes.

Q. Do you remember those?

A. Yes.

Q. Did I understand you to say that there would be any difficulty there on account of the railroad tracks?

A. I said that there was a gate leading from the unloading chutes, with a triangular piece of property, to Packers Avenue.

Q. You say "a triangular piece of property"?
A. Yes.
Q. Is that bare land you are referring to?
A. It is bare land, yes, sir.
Q. Just a triangular piece of bare land?
A. Yes, sir. There are tracks on each side of it, but there is a sufficient space to permit all trucks to be moved from Packers Avenue to the gate, which is the westerly end of the stock yards property.
Q. You mean, a truck might back up to those gates in spite of the tracks and take the property out?
A. Yes. In fact, the Globe Rendering Company takes dead animals out of the stock yards through the medium of truck. That truck I have seen go up Packers Avenue and turn at that gate—or, turn at that point and go in through that gate.
Q. Now, with reference to the north and southbound traffic on Packers Avenue at that point, is that a constant matter?
A. Yes, sir; regular traffic moves there all day long.
[fol. 334] Q. Regardless of the railroad tracks?
A. Yes, sir.
Q. Are there many railroad tracks around the fringes of the stock yards property?
A. There are, yes, sir.
Q. This general traffic—by that, I mean trucks, passenger cars of employees, or anybody else who has business, come and goes over those tracks?
A. Yes, sir.
Q. Could you mention one place where that is so?
A. (No answer.)
Q. I will just suggest one. How about the south exit from the yards on Racine Avenue?
A. Well, at 47th Street there is a series of tracks there. That is the entrance and exit into and out of the yards. Gates are maintained there and a large amount of traffic comes into and out of the yards at that point.
Q. Would you say thousands of cars pass in and out over those tracks morning and night?
A. Yes, sir.
Q. How about the entrance from Halsted Street that comes in there and is Exchange Avenue within the stock yards, and which crosses a group of tracks just at the east end of the stock yards property?

A. A large amount of traffic moves in and out there.
[fol. 335] Q. How about tracks? Without counting them, have you any idea how many there are?

A. I would guess there are six or seven sets of tracks at that end of the stock yards, the east end of the stock yards on Exchange Avenue, known as the Stonegate Point, where thousands of cars pass daily in and out. In fact, I have gone by there as many times as a half a dozen times in one day.

Q. When you say that thousands of cars come in and go out a day, is that one of the normal entrances and exits for all employees in the stock yards area with the packing houses, the commission men, or otherwise?

A. Yes. The trucks bringing livestock into the yards come in through that point, too.

Q. Now, are the tracks that you have mentioned which are being used daily—or, I mean, over which vehicular traffic is moving daily in large quantities, substantially different from those crossing Packers Avenue at the point you suggested as a possible exit?

A. No, sir.

Mr. Smith: Mr. Rynder, are you now in effect amending your complaint to include Packers Avenue as a public street?

Mr. Rynder: No, sir. As I understand it, Packers Avenue is not a public street.

Mr. Smith: Then I move to strike all of this talk about Packers Avenue. I do not see what it has to do with this case.

[fol. 336] Mr. Rynder: It has this much to do with the case, that I never mentioned it on direct, but on cross Mr. Smith pulled out a map and asked about these various items.

Mr. Smith: I asked about the routes of egress to the nearest public streets.

Mr. Rynder: Yes.

Mr. Smith: He named that one.

Mr. Rynder: That is right. This way via Packers Avenue would be one of the exits.

Mr. Smith: To a public street?

Mr. Rynder: Yes.

Mr. Smith: Packers Avenue?

Mr. Rynder: Sure.

Mr. Smith: Is Packers Avenue a public street?
Mr. Rynder: No.
Mr. Smith: What?
Mr. Rynder: No.
Mr. Smith: Where is the public street?
Mr. Rynder: 39th Street, just north of it, if I am right. Am I right?

The Witness: Not at that location.
Exam. Carter: What would be the public street?

By Mr. Rynder:

Q. What would be the public street Packers Avenue takes you to?

By Exam. Carter:

Q. What would be the public exit reached via Packers [fol. 337] Avenue?
A. There would not be any public street reached on Packers Avenue.

Mr. Smith: Exactly. May we go off the record, Mr. Examiner.
Exam. Carter: Off the record, Mr. Reporter.

(Discussion outside the record.)

Mr. Smith: Are we back on the record now?
Exam. Carter: On the record.
Mr. Smith: I move to strike all of the questions and answers relating to the handling of this livestock from the pens of the Union Stock Yards out to Packers Avenue. You say I started it. Now I move to strike it all.
Exam. Carter: I think it is proper to do that, because according to this witness' own testimony just a few moments ago, Packers Avenue is not a public street, and there is no public street to be reached via Packers Avenue from the various unloading pens.

By Exam. Carter:

Q. Is that what you just testified to?
A. You can reach a public street from Packers Avenue, yes, sir.

Q. Would that, or would that not be an exit to a public street which you had in mind when you were attempting to describe the various exits to public streets?

A. As I recall it yesterday, I did not have——

Q. Can you not answer that "Yes" or "No"?

A. No. I cannot answer it "Yes" or "No".

Q. In other words, you were asked yesterday to describe [fol. 338] the egress to the public streets from the various unloading pens as contemplated in your complaint.

Mr. Smith: That is exactly it, of course.

Exam. Carter: That is what you were asked to do, was to describe those. Now then, you described several——

The Witness: In fairness to me, let me answer that——

Exam. Carter: I would like to finish. You then described several——

Mr. Rynder: Excuse me just a moment.

Exam. Carter: I just want to get this on the record. I want to get his understanding.

By Exam. Carter:

Q. You mentioned Packers Avenue, but you later said it was your understanding that Packers Avenue was not a public Street. Is that right?

A. Yes, sir.

Q. You did not testify to that?

A. I said I did not know whether it was a public or private street.

Q. Yes. That is right. You said you did not know what it was.

The Witness: Because there was regular traffic moving over that all of the time; I do not know the ownership.

Q. Let me put it this way: In attempting to describe these exits to public streets, did you or did you not have in mind naming the exit Packers Avenue as one of the exits contemplated in your complaint?

[fol. 339] A. I had that in mind with the thought that if it were a public street it would be egress to the nearest public street that Mr. Smith was trying to develop from me, with the qualification as to depending upon where the stock was unloaded.

Q. If it was not a public street, then was it your idea to use that as an exit, as contemplated in your complaint?

A. If it is not a public street, then it should not be in-

cluded in answering Mr. Smith's question as to egress to a public street.

Q. Did I understand you to testify this morning that it is not a public street?

A. No. I still do not know.

Mr. Smith: Mr. Rynder said that.

Exam. Carter: Somebody said it was not a public street.

Mr. Smith: Yes.

Mr. Rynder: I do not think the testimony ought to be stricken, because we will connect it up later. It is an available exit to a public street. We own it. We will certainly let our own livestock go over it.

Exam. Carter: You mean, Swift and Company owns Packers Avenue?

Mr. Rynder: Yes.

Exam. Carter: This witness just testified a few minutes ago it is not an available exit—or rather, that it may be an exit to a public street, but it was not an exit to a public [fol. 340] street such as he was describing yesterday. That is the effect of what he just said.

Mr. Smith: Yes.

Mr. Rynder: I do not know what he was describing yesterday.

Mr. Smith: He was describing exits to the nearest public streets as contemplated by your complaint, Mr. Rynder. If it is your position that is one of them——

Mr. Rynder: It is one of the possible exits.

Mr. Smith: Then we have to undertake to show that these animals are moved, under your complaint, out to Packers Avenue, which is on the property of Swift and Company, and from that point on out to a public street over Swift's property. That is your complaint, then?

Mr. Rynder: It is one of the possible exists. It is a little longer, of course.

Mr. Smith: I suppose we will have to come to you and arrange with you for us to have those animals driven——

Mr. Rynder: I hereby now offer you the use of that street without any charge.

Exam. Carter: Well, now, gentlemen, let us not argue about it.

Mr. Smith: You do not amend the complaint?

Mr. Rynder: No. I am not amending my complaint.

Exam. Carter: Then you desire to develop this testimony

[fol. 341] for the purpose of showing that the exit via Packers Avenue is a possible exit to a public street?

Mr. Rynder: It certainly is.

Exam. Carter: Under those circumstances, I will allow you to go ahead.

Mr. Rynder: It certainly is, on our traffic. We will show that by this witness.

Exam. Carter: Very well.

Mr. Rynder: For that reason I would like to have the testimony left in. We are not insisting that that be used. We offer it freely, and if our men were allowed to go into the unloading chutes they probably would bring it down our private street. The railroad would not be required to furnish anything except the right for us to get out of the stock yards.

Mr. Smith: That is not what your complaint says. Your complaint says we ought to provide transportation according to the letter of our contract up to the nearest public street. That means we have to transport this over Swift's property from the intersection of the boundary line of the yards with Packers Avenue, north to the public street.

Exam. Carter: We will recess for five minutes.

Mr. Rynder: I would like to have the record complete on that, before we take a recess.

Exam. Carter: Go ahead.

Mr. Rynder: Mr. Smith has not properly stated the terms [fol. 342] of our complaint. Having made that remark, I will not elaborate. That will be shown by the printed copy of the complaint.

Exam. Carter: We will recess for five minutes.

(Short recess.)

Exam. Carter: Come to order, gentlemen. You may proceed.

Mr. Rynder: Mr. Examiner, I would like to make it clear, if I have not done so already, that we are not asking here that the carriers make the stock available to us at any particular point. We recognize that that is a matter within their proper control. These questions that came up in connection with the map, and so forth, were upon the cross examination of Mr. Tally, and not upon the direct examination.

Mr. Smith: I do not want to unnecessarily prolong this discussion, but I am amazed at the statement counsel just

made. He says now, as I understand him, he is willing that egress be given for this stock any place the carriers desire. It might be, from that, five miles from these yards. That is not what he says in his complaint. Much more wisely, in his complaint, he has attempted to qualify that and limit it by saying "Egress at the nearest public street".

Mr. Rynder: I mean that.

Mr. Smith: I do not know whether that is being modified now or not. This whole thing arises because among these egresses or points of egress the witness named one which was not on a public street, but which was on the property of Swift and Company.

[fol. 343] Mr. Rynder: Let us use the complaint, instead of a distortion of it. Here is what it says: "and that complainants be permitted immediately to remove such livestock from the unloading pens to a public street by a proper and convenient means of egress to such street to be designated by defendants." We do not care whether defendants designate the shortest or an intermediate one, or what-not. We presume as a matter of economy they would designate the shortest one, but what the complaint says is not what Mr. Smith said it says.

Mr. Smith: I do not care to pursue it on my account.

Exam. Carter: You may proceed.

Mr. Rynder: I should think not, after having misstated the complaint, Mr. Smith.

Mr. Smith: I did not catch that. What was that? Read Mr. Rynder's remark please, Mr. Reporter.

(The record was read.)

Exam. Carter: Proceed, gentlemen.

By Mr. Rynder:

Q. Mr. Tally, it was suggested to you yesterday on cross examination by Mr. Smith that there might be as many as 20,000 carloads of these directs which would arrive in a year. Would that be an extraordinary number—I suppose he meant by that, all arrivals at the stock yards. Would that be an extraordinary number to handle by your own crews?

Mr. Smith: Read the question please, Mr. Reporter. I cannot hear you, Mr. Rynder. I am sorry. Speak up a little [fol. 344] please.

Exam. Carter: Read the question.

(Question read.)

A. No. 20,000 carloads over a period of a year, constituting 365 days—stock does arrive every day of the week—would represent something around 400 a week, or, on a 7-day week, a little over 50 a day, and inasmuch as livestock arrives at all hours of the day, it might not be any more than two or three carloads an hour.

Q. Would it be a fair assumption that all of those carloads of directs come to your company?

A. No.

Q. All that comes to the yards?

A. No, it would not be. Directs are shipped to other packers in the yards.

Q. Would you say that as much as half of those directs would come to your company, considering the business of the yards and the packers there?

A. No; I would not say that half of them would.

Mr. Smith: We are going to show that, if that will be of any assistance to you, Mr. Rynder.

By Mr. Rynder:

Q. Considering your probable share of the 20,000, do you anticipate any difficulty in having crews getting the livestock out of the way immediately upon arrival?

A. No, sir.

[fol. 345] Mr. Rynder: Just a moment, please. That completes my examination of Mr. Tally.

Exam. Carter: Are there any further questions?

Mr. Smith: I have just one or two more questions.

By Mr. Smith:

Q. Have you ever requested delivery of any livestock in Chicago on team tracks?

A. I think I have answered that question a little while ago; to my knowledge, no.

Q. You are familiar over a period of some years what the application is of rates on commodities generally and on livestock, particularly to Chicago, are you not?

A. I believe so, yes, sir.

Q. You referred yesterday to a decision of the Commission in Chicago Livestock Exchange against the Sante Fe, Docket 24847, did you not?

A. Yes, sir.

Q. Just for the purpose of identification, that is the case in which was involved the so-called terminal charge on livestock, is it not?

A. Yes, sir.

Q. For a great many years prior to the cancellation of those rates, as a result of this decision, the western lines had maintained a charge of $2.70 in addition to the flat line haul rate on all traffic destined to the Union Stock Yards at Chicago is that not so?

[fol. 346] A. Yes, sir. That is so.

Q. That charge was removed as a result of this decision, was it not?

A. Yes, sir.

Q. About when was that charge actually cancelled in the tariffs?

A. About a year—in the last year or two years, I would say, if my memory serves me correctly.

Q. Within the last year or two?

A. Yes, sir.

Q. Did that case involve the charge made by the eastern lines, the terminal charge made by the eastern lines on inbound livestock?

A. I do not believe it did. I am not sure. They had a different charge of $1.35, as I recall it.

Q. Well, state whether or not that charge of $1.35 on the eastern lines is still in effect.

Mr. Rynder: It is understood, of course, Mr. Smith, that whatever answer the witness is giving is simply such as he can draw from the copy of the Commission's decision before him.

Mr. Smith: I have asked the witness whether he knew.

Mr. Rynder: Unless he knows otherwise.

Mr. Smith: Yes. He says he knows this rate situation. I am trying to find out what he knows.

Exam. Carter: Can it not be conceded that the $1.35 charge was not involved in that case?

[fol. 347] Mr. Smith: I would suppose so.

Exam. Carter: I do not think it was.

The Witness: Well, that is my understanding of the complaint, yes, sir.

By Mr. Smith:

Q. That it was not?

A. Yes, sir.

Q. And is it your understanding that the $1.35 maintained by the eastern lines is still in effect?

A. Yes, sir.

Q. That is $1.35 per car, is it?

A. Yes, sir.

Q. And the $2.70 was $2.70 per car?

A. Yes, sir.

Q. And the $2.70 applied only on traffic destined to the Union Stock Yards, did it not?

A. Yes, sir.

Q. And the $1.35 has likewise applied only to livestock destined to the Union Stock Yards?

A. That is my recollection. I would not want to say definitely without looking at the tariffs.

Q. With reference to the—what don't you want to say definitely?

A. That it applies only to the Union Stock Yards.

Q. Are you speaking now of the charge of $2.70 of the western lines, that was eliminated in this decision of the [fol. 348] Commission in Docket 24847?

Mr. Smith: Read my question please, Mr. Reporter.

(Question read.)

Mr. Smith: Strike that question.

By Mr. Smith:

Q. You said a moment or two ago that this $2.70 terminal charge maintained by the western lines involved in Docket 24847 applied only on livestock delivered at the Union Stock Yards. Are you now saying you do not know whether that is so or not?

A. No. I know it applied to the Union Stock Yards.

Q. And applied only to the stock yards?

A. That is my understanding of it, without giving you a definite answer, without looking at the tariff.

Q. That is your understanding?

A. I do not try to retain all of those facts in my mind.

Q. Is it likewise your understanding that the $1.35 charge maintained by the eastern lines, which is still in effect, applied only on livestock?

A. Yes, sir, that is my understanding.

Q. Destined to the Union Stock Yards?

A. That is my understanding, with the same qualification.

Mr. Rynder: Mr. Examiner, this is not cross examination. I have not objected to it because I see no reason to object to it, but I shall have to ask the witness some questions on cross examination as if he were Mr. Smith's witness. I [fol. 349] hope he will not claim I am impeaching the witness. Mr. Smith would know that the questions he is asking are not true, if he read all of that decision.

Mr. Smith: Mr. Rynder, I do not think we ought to go into any argument about that. If you will state your understanding of it, perhaps we can agree. Perhaps we can go off the record.

Mr. Rynder: I will state it off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: On the record.

By Mr. Smith:

Q. Mr. Witness, Mr. Rynder stated off the record that this $2.70 charge applied not only on livestock delivered to the Union Stock Yard and Transit Company, but applied also on livestock delivered to the Omaha Packing Company. Is that or is it not true?

A. That is a fact, that the $2.70 charge applied to both locations, and was eliminated at the same time at both locations.

By Exam. Carter:

Q. And applied only to those locations in Chicago?

A. Yes, sir.

By Mr. Smith:

Q. Do those terminal charges still apply intrastate?

A. Yes, and I believe to some interstate points that were not included in the complaint.

Q. What points are those? Do you have them in mind?

[fol. 350] Exam. Carter: Do you mean, from some points?

Mr. Smith: Points of origin, you mean?

The Witness: I believe Wisconsin—probably that is the only one, the balance of it being Illinois.

By Mr. Smith:

Q. That is, all Wisconsin origins, or just some?

Mr. Rynder: Would not the best evidence of that be for either one of us to give reference to that tariff?

Mr. Smith: I will undertake to give reference to the tariff. I will not pursue this any further.

Mr. Rynder: That involves a considerable feat of memory.

Mr. Smith: That is all.

Exam. Carter: Are there any further questions?

Mr. Rynder: I think that is all.

Exam. Carter: That will be all, Mr. Tally.

(Witness excused.)

Mr. Rynder: Mr. Examiner, with reference to the last few questions by Mr. Smith, I am advised now that sheet 6 of exhibit 4 shows the territory from which the terminal charge does apply. If Mr. Smith finds that to be correct, we will not need anything further on it.

Mr. Smith: Sheet 6 of exhibit 4?

Mr. Rynder: Yes. I will now call Mr. Reneker.

Exam. Carter: Mr. Reneker has already been sworn.

W. T. Reneker was sworn and testified as follows:

[fol. 351] Direct examination.

By Mr. Rynder:

Q. Please state your name and residence.

A. W. T. Reneker, 8204 Peoria Street, Chicago, Illinois.

Q. What is your business or occupation?

A. Head hog buyer for Swift and Company.

Q. How long have you been employed by Swift and Company?

A. Over 34 years.

Q. What has been your experience with Swift and Company?

A. I have been in the hog buying division since September, 1904. During part of the intervening period I was in the same line of work for Swift and Company at Winnipeg, Manitoba, Canada, for seven years, and Cleveland, Ohio, for three years.

Q. When did you return to this work at the Chicago plant?

A. June, 1926.

Q. Have you been continuously engaged in that work at the Chicago plant since that date?

A. I have.

Q. Does the nature of your work at Chicago require you to be around and about all parts of the stock yards of the Union Stock Yard and Transit Company, and to be familiar with its facilities of various kinds, including loading and unloading pens, holding pens, and the methods of delivery used in connection with livestock on those premises?

A. Yes. I am familiar with all of these loading and unloading facilities and handling facilities.

[fol. 352] Q. I believe I will stop now the questions I had intended to ask you, Mr. Reneker, and ask you if you—just a moment, until I get this memorandum. I will ask you if you obtained the information requested yesterday by Mr. Smith, which I understood to be the percentage the hogs consigned to Swift and Company, Omaha Packing Company and G. H. Hammond & Company at Chicago, bears to the total hogs slaughtered at Chicago in 1937 by those companies.

A. 22 per cent of the hogs slaughtered at Swift and Company's plant for the year 1937 were purchased on the Chicago Stock Yards. All others were received either direct at the Omaha plant or direct at the Union Stock Yards, Chicago.

Q. Just one further thing at this time, Mr. Reneker: there have been suggestions that we were not using Union Stock Yards at all as a delivery. Have you made up a memorandum of the direct receipts at the Chicago Stock Yards for the year 1938?

A. I have.

Q. What do you find them to be up to date, for this year?

A. We have received several shipments of livestock, principally sheep, during January—would you like them enumerated by months? That is the way they are compiled here.

Q. Yes.

A. January, 1937, 5,757 sheep; February, 3,206 sheep. These are all sheep I am reading now. 495 for March; 3,855 for April; 13,683 for May.

[fol. 353] Q. Does that go back into 1937?

A. That is all 1937.

Q. All 1937?

A. Yes.

Mr. Smith: Do you happen to have the cars there also?

A. No, sir. I just have it by the head.

By Mr. Rynder:

Q. Proceed, Mr. Reneker.

A. Where did I leave off, please.

Mr. Rynder: Read the witness' last answer.

(Answer read.)

The Witness: June, 8,839; July, 9,453; August, 10,136; September, 2,394; October, 5,724; November, 2,146; and December, 1,254.

By Mr. Smith:

Q. Are those all sheep?

A. All sheep.

Mr. Smith: All right. Go ahead.

The Witness: That is what I specified. During the same period, for the month of February, 1937, we received 234 hogs; in October of 1937 we received 220 hogs; and no other hogs during the entire period of 1937. We did not receive any cattle or calves direct at the yards during that same period.

By Exam. Carter:

Q. Could you approximate the number of hogs in a car, just so we could determine the number of cars, roughly?

A. Approximately 100. We load to a minimum weight as [fol. 354] near as we can. It would average somewhere around 250 pounds. For a minimum of around 25,000 pounds loaded, it would be approximately 100 hogs.

Q. Let me ask you another question while I think of it. Are sheep handled the same at the stock yards as hogs are handled?

A. In unloading only, or in the complete operation?

Q. The complete operation.

A. The complete operation, as I understand it, and have observed it——

Mr. Rynder: Let me ask you this:

By Mr. Rynder:

Q. Have you observed it personally, recently?

A. Yes, I have observed it over a number of years.

Q. Now answer the question.

A. Sheep are unloaded by the stock yard company's employees and are delivered by them to the sheep pens and by them to the commission men's pens and alleys, or yarded in the sheep house by the yard company's employees.

By Exam. Carter:

Q. Those sheep pens are situated in a different part of the yard, are they not, than the cattle and hog pens? In other words, the pens in which the sheep are kept after they are driven away from the unloading chutes are in a different part of the yards and are in different facilities than are used for the holding of cattle and hogs?

A. That is right.

Q. Is that correct?

[fol. 355] A. Yes. There are sheep barns, so designated, on those maps. In a great many cases they are a good deal nearer than where hogs or cattle would be unloaded that were being delivered to commission men's pens.

Exam. Carter: Let me ask you this:——

Mr. Rynder: Do you care to have the witness identify them on the map?

Exam. Carter: No. That is all right.

By Exam. Carter:

Q. Is this understanding correct, that in many instances the cattle and hogs may be kept in holding pens adjacent to the unloading chute for some period of time, depending upon the congestion, whether or not there is congestion, but as to sheep, that is not the situation? They are removed from those holding pens adjacent to the unloading chutes as promptly as possible to the so-called sheep house, is that correct?

A. I would say practically all of them are removed direct from the chute pens to the sheep barns.

Q. It is an exception for the sheep to be placed in the holding pens adjacent to the chutes?

A. Yes, sir, it would be.

By Mr. Smith:

Q. They never are, are they?

A. I do not know of them ever having placed them there, Mr. Smith. Well, I do know of exceptions. An exception would be where a load of sheep arrives that are scabby and the ante mortem inspector does not allow them to go into [fol. 356] the regular sheep pens. They are then yarded in what are known as quarantine pens, in other than sheep pens. I have seen them yarded in hog pens under those conditions.

Q. Just to preserve the continuity here, may I ask the witness to indicate first where those sheep houses or sheep pens are; and second, why there is this difference in handling with the sheep?

Mr. Rynder: Would it not be better to identify them on the map, Mr. Smith?

The Witness: This is lying just the way the position of the yards is, Mr. Smith (indicating). The sheep pens are designated on exhibit 1, the map, as being that area just formed more or less as a U-shape, here, and here, and here (indicating).

By Mr. Smith:

Q. Can you not identify it by referring to the numbers on the map, such as A-7, A-8, and so forth, so they can be identified?

Exam. Carter: This is marked D-6 and D-5.

The Witness: Just a second. I think I can probably do it, Mr. Smith; would you take that to be a 4 or a 1 on that?

Mr. Smith: Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

The Witness: I take this to be No. 4 (indicating). Would you take that for a number 4, Mr. Examiner?

[fol. 357] Exam. Carter: I could not tell. While we are right at this point, let me ask this: are there any explanations of these legends on here, for this exhibit?

Mr. Rynder: The engineer went away.

Exam. Carter: Why not have the one who has that information prepare it, and send it to us later, not at the hearing?

Mr. Rynder: I do not know whether I can get him back immediately. If you are willing to accept Mr. Reneker's statement, insofar as he knows—we can ask him first if he knows—I will be glad to have him explain those, because I think he does know them—do you not, Mr. Reneker?

The Witness: Fairly well, yes.

Mr. Smith: I think the Examiner's suggestion is an excellent one. Somebody prepared this map. There must be a legend that explains those things.

Mr. Rynder: There is no legend.

Mr. Smith: There is not?

Mr. Rynder: No.

Exam. Carter: What I mean is, could not the engineer give us a little explanatory sheet, to explain those things?

Mr. Smith: He said he would come back at any time.

Exam. Carter: You can call it 1-A. It does not have to be done at this hearing. You can do that even after the hearing is closed, describing what D-6, D-7 and so forth is.

The Witness: I know definitely that all of these (indi-
[fol. 358] cating) are cattle alleys.

Exam. Carter: The reason is this: when I get back in Washington, I will want to know what D-5 is, and so forth. This is off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

By Mr. Smith:

Q. Now, answer the second of my questions, as to why the sheep are handled in this different manner you have described.

A. I would say, Mr. Smith, that the principal reason is sheep must be protected from the weather more than cattle or hogs. If their wool gets wet, or snow gets on them, it decreases the value. They have a heavier shrink, and for the benefit of the producer or shipper, in order that he may secure the maximum selling price, the sheep are delivered

over to these pens as fast as possible, because it is the best equipped place to handle them, under cover. The sheep pens are covered entirely.

Q. They are different in that regard from the pens generally?

A. Yes, sir.

Q. You spoke about the possible detriment that the sheep might suffer in respect to the value of their wool by getting dirty. Is there any difference in the pens in that regard? Are the sheep pens maintained in a different way from the other pens?

A. The construction of the pen and its equipment is different in the hog alley. Corn is fed right on the floor to the [fol. 359] hog. In the sheep alley there are hay racks put all around the pens, low enough so that the sheep have access to the feed. In the cattle alley, it is naturally the same. Hay racks or troughs are built up from the floor.

Q. Is it true that greater care has to be taken in the proper handling of sheep with reference to maintaining them in proper condition, than for any of the other species?

A. There should not be any reason why livestock should not be taken care of with equal care, but for some reason or other there has been a practice at the yards for the yards company to handle the sheep themselves to the pens. They have handled cattle and they have handled hogs direct to commission men's pens. I do not say it is the common practice or one that is constant, but they do apparently handle all sheep, for I have never seen any of the commission men's men taking their own sheep from the alleys to the pens.

By Exam. Carter:

Q. Have they also handled direct shipments of sheep to your company?

A. They deliver them to the sheep pens, or, the sheep barns, yes. We take delivery of them there.

Q. By your own employees?

A. By the yards company employees.

Mr. Smith: I think that is all.

Exam. Carter: Off the record.

(Discussion outside the record.)

[fol. 360] Exam. Carter: We will recess until 2:15.

Mr. Rynder: Until what time?

Exam. Carter: 2:15.
Mr. Rynder: Thank you.

(Whereupon, at 11:15 A. M. Central Standard Time, adjourned until 1:15 P. M. Central Standard Time.)

Afternoon Session, 1:15 P. M. C. T. S.

Exam. Carter: Come to order, please, gentlemen.
Mr. Rynder: May it please the Examiner, I have laid before the Examiner and before counsel for the defendants a map which I would like to have marked for identification as Complainant's Exhibit No. 20.
Exam. Carter: It may be so identified.

(Complainant's Exhibit No. 20 marked for identification.)

Mr. Rynder: Mr. Reneker—before I ask any questions I will simply say this: our purpose in offering this map is to get in a little larger area than appears in the stock yards map, so the Examiner and the Commission may know from the map where Ashland Avenue and Pershing Road and a few others like that are located, that have not been shown on the big map which includes only the stock yards area. It is not in any way intended to modify the stock yards map, or anything that may be on there in the way of D-4, A-6 or anything of that kind. In other words, it may be understood that as to the stock yards area, the map offered as Complainant's Exhibit 1 is absolutely con- [fol. 361] trolling. May we go off the record?
Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. As I understand it, at this time you want to excuse Mr. Reneker for the time being and put Mr. Kidwell back on?
Mr. Smith. That is correct.
Exam. Carter: You may be excused for the time being, Mr. Reneker.
The Witness: All right.

(Witness withdrawn.)

Exam. Carter: Take the stand, Mr. Kidwell.

E. W. KIDWELL recalled, having been previously sworn, resumed the stand and testified further as follows:

By Mr. Smith:

Q. You are the same Mr. Kidwell who has previously testified in this case?

A. Yes, sir.

Q. Mr. Kidwell, reference has been made to a viaduct over Halsted Street, approximately east of unloading platforms Nos. 1 and 2—no; 4 and 2. That viaduct has been described here. Who owns that viaduct?

A. That I do not know. I do not know who owns the viaduct.

Q. Well, is it correct that its west end rests on stock yards property?

[fol. 362] A. Yes.

Q. How much of it rests on stock yards property?

A. That I do not know. I know the west end does.

Mr. Smith: Well, of course, my position on that, Mr. Rynder, in the absence of any evidence to the contrary would be that that was a fixture and part of the realty, but if you have a different idea you can develop the facts. That is what I am interested in, getting the facts.

Mr. Rynder: I will pass the matter at this time; and let it remain just as it is.

Mr. Smith: Who testified about the property of the stock yards in Docket No.—What is that docket?

Mr. Rynder: 472.

Mr. Smith: —472, before the Secretary of Agriculture?

The Witness: I do not know who was on that case.

Mr. Rynder: I have no objection to the fact of the ownership being brought out by anybody who knows it. I myself do not know it.

Mr. Smith: I do not know it, and I do not think it has been material. It has been mentioned, and there has been a contradiction in the record as to who owns it. I think we ought to find out. Will you find out, Mr. Kidwell?

Exam. Carter: Does Mr. Henkle know the ownership?

Mr. Rynder: Let us go off the record.

Exam. Carter: Off the record, Mr. Reporter.

[fol. 363] (Discussion outside the record.)

Exam. Carter: Put this on the record, Mr. Reporter.

Mr. Smith: The parties agree that the viaduct over Halsted Street extending from a point east of platforms

Nos. 2 and 4 is owned by the Union Stock Yard and Transit Company.

By Mr. Smith:

Q. Now, Mr. Kidwell, reference has been made to the ownership of Packers Avenue from a point south of 39th Street to 47th Street. Who owns that fee?

A. I do not know who owns Packers Avenue. We do not.

By Exam. Carter:

Q. You know that the stock yards company does not, is that it?

A. Yes.

Mr. Smith: Now, Mr. Rynder, if you are willing to state as a fact here that that is owned by Swift and Company, and you tell me that you know it is owned by Swift and Company, I will accept that.

Mr. Rynder: Let me say that I got this—off the record.

Exam. Carter: This is off the record, Mr. Reporter.

(Discussion outside the record.)

Exam. Carter: Now, back on the record.

Mr. Rynder: Mr. Smith, I am willing to stipulate that Packers Avenue through the area you have described is owned jointly by Libby, McNeil & Libby, which is a former subsidiary of Swift and Company, and by Swift and Company, in joint ownership with the right of use to each of those companies.

[fol. 364] Mr. Smith: Jointly.

Mr. Rynder: Jointly.

Mr. Smith: And that it is not a public street, as you stated.

Mr. Rynder: It is not a public street.

Mr. Smith: Is Libby, McNeil & Libby now a subsidiary of Swift?

Mr. Rynder: Not in the strict sense, although there is still some stock ownership.

Mr. Smith: There is still some intercorporate relationship through stock ownership?

Mr. Rynder: Yes.

Mr. Smith: That is, Swift and Company owns some stock of Libby, McNeil & Libby?

Mr. Rynder: Well, I do not think it is important here. I think some of our directors got stuck with some of the stock.

Mr. Smith: In other words, it is not an intercorporate relationship, but a relationship through officers, is that it?

Mr. Rynder: What?

Mr. Smith: It is a relationship through officers of the company, through personal holdings of the stock of the other company, by officers of Swift and Company?

Mr. Rynder: Yes.

Mr. Smith: All right.

Mr. Rynder: I would like to stipulate also to this effect, [fol. 365] that while that is the ownership of Packers Avenue, its use is allowed at all times to the entire public for their own business, for Libby's business, Swift's business, or merely to drive all kinds of trucks, or any business that cares to pass over it.

Mr. Smith: Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: Put this on the record. I cannot stipulate to that, in view of that.

Mr. Rynder: We will pass the stipulation then.

By Mr. Smith:

Q. Mr. Kidwell, some reference has been made to alleys which extend from the east end of the Halsted Street viaduct we have just been talking about, over to Emerald Avenue. Who owns those alleys?

A. Off hand I do not know.

Mr. Smith: May we go off the record again, Mr. Examiner?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Is that all of Mr. Kidwell?

Mr. Smith: That is all I have.

Exam. Carter: Are there any further questions of Mr. Kidwell at this time?

(No response.)

Exam. Carter: You may be excused, Mr. Kidwell.

[fol. 366] (Witness excused.)

Mr. Rynder: I will ask Mr. Reneker to take the stand again, please.

W. T. Reneker having been previously sworn, resumed the stand and testified further as follows:

Direct examination (Cont'd.)

By Mr. Rynder:

Q. Now, Mr. Reneker, I call your attention to the map that has been marked for identification as Complainant's Exhibit No. 20.

A. Yes.

Q. I ask you where you obtained possession of that map.

A. From our Chicago Real Estate Department.

Q. Is that a map kept regularly in their possession?

A. It is.

Q. For the purpose of knowing their ownership of real estate?

A. Their own and public streets and alleys in and about the stock yards area.

Q. Now, of your own information and regardless of the Real Estate Department, do you know whether that map correctly shows with approximate accuracy the locations of the streets shown on there such as South Ashland, Pershing Road, Halsted Street, Loomis Street, Racine Avenue, Exchange Avenue and the other streets, if any, which are shown on there?

A. It is accurately marked. I note there is one exception. [fol. 367] On the extreme east side the line running parallel with the edge should be marked Emerald Avenue.

Q. Where is that shown?

A. On the extreme edge it is only marked part way in between there, between the two buildings, and not all the way along. It is only shown to Root Street. Emerald Avenue extends on south of that to 47th Street.

Q. Then the one correction you would make would be that Emerald Avenue should be extended?

A. It should be extended.

Q. Due south to where?

A. To 47th Street.

Q. To 47th Street?

A. Yes, sir.

Q. Mr. Reneker, referring now to the map of the stock yards property, Complainant's Exhibit 1, did you place thereon certain legends in white paper identifying certain streets, unloading pens and other locations?

A. I did.

Q. Do they correctly represent the locations indicated by the legends in white on exhibit 1?

A. They do. They were placed over the legend that was already on those maps. It was merely to block them out in outline, so they would be more easily read.

Q. Do you know how livestock consigned to the Union [fol. 368] Stock Yards at Chicago reaches the unloading chutes and pens of the Union Stock Yard and Transit Company?

A. Yes. The line haul carriers bring their trains of livestock, under their own power and without switching by the Chicago Junction to tracks adjacent to the unloading platforms of the Union Stock Yard and Transit Company.

Q. Will you please indicate on the map, marked Complainant's Exhibit No. 1, the section in which livestock, consigned by railroads to the Union Stock Yard and Transit Company, Chicago, is unloaded by the stock yards company.

A. The platforms which are indicated on Complainant's Exhibit 1 as platforms No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7 and No. 8, are where practically all of the livestock are unloaded, and some loading is done from those same platforms.

Q. Is there some portion of that area that is not used very intensively or frequently at the present time?

A. Platforms Nos. 5, 6, 7 and 8 are not being used as much right now, and have not been, for the past two or three years because of the reduction in the movement of livestock. The entire division known as the Northwest Division and most of the Cuba Division have been closed and all operations as far as hogs are concerned are being carried on in the Rock Island and Burlington Divisions of the hog house.

Q. Have you frequently, in the course of your duties, watched the work of unloading livestock at the unloading [fol. 369] chutes of the Union Stock Yard and Transit Company?

A. I have.

Q. Please state what facilities are used for that purpose after a railroad car is placed for unloading.

A. Each car is spotted as nearly as is possible to the entrance of the receiving pen.

Q. You mean, opposite?

A. Opposite the entrance to the receiving pen. The tow board is then placed between the platform and the car. The livestock passes over the platform and down a small inclined chute into the receiving pen or unloading pens, as illustrated on exhibit 1. For example, in exhibit 1, immediately south of platform No. 2, are pens numbered 21, 22, 23, and so forth. These are unloading pens in which the livestock is placed after coming out of the car and down the chute.

Q. When direct shipments are received by rail at the unloading pens which you have described, please state how they are handled by the U. S. Y. & T. Company beyond such unloading pens.

A. The stock that arrives throughout the daytime is generally delivered direct to employees of Swift and Company from the chutes, the company having its own employees there at the time of arrival of the livestock cars to accept delivery. If the Swift employees are not there to receive the stock, the animals are yarded by the Union Stock Yard and Transit Company employees in holding pens, where they are held by that company until our employees take [fol. 370] delivery at such holding pens.

Q. In this method of delivery of direct shipments, are various facilities of the U. S. Y. & T. Company used, either by their employees or by your employees?

A. Yes. Employees of the U. S. Y. & T. Company place the livestock in holding pens of the stock yard company, and the livestock is later moved by our employees through the facilities of the stock yard company, including alleys, runways, and so forth, to our plant.

Q. Is there any other way at the present time by which you are permitted to take livestock from the unloading pens to your plant?

A. Repeat that, please.

Mr. Rynder: Read the question.

(Question read.)

By Mr. Rynder:

Q. Is there any other way than over these facilities you have mentioned, including the runways and so forth, and alleys—is there any other way in which you are permitted at the present time to take livestock to your plant?

A. Other than crippled hogs which we have hauled in cripple carts, there is no other way.

Q. Are you permitted to take it direct from the unloading pens to some public street?

A. No, sir, we are not.

Q. For this service do you pay compensation to the stock [fol. 371] yard company?

A. We do. I understand that compensation to the stock yard company is fixed in a tariff filed by The Union Stock Yard and Transit Company of Chicago with the Secretary of Agriculture.

Q. Are you familiar with the demands which have been made by Swift and Company upon the railroad carriers for the right to obtain direct shipments of livestock at the unloading pens and remove them by the shortest egress to a public street from the unloading chutes without payment of yardage?

A. I have read the letters written by Swift and Company to the carriers and the carriers' replies which are contained in exhibit 2.

Q. Let me ask you, in that connection: after those first letters were written, did you have a crew go out early in the morning to demand access to the unloading pens?

A. Somewhere around the middle of May, possibly after the 15th, or the 20th, when this litigation first started, we had been refused delivery of our stock prior to 6 o'clock. We had a gang go out there at 4 or 5 o'clock in the morning to take delivery on a train of livestock that had been spotted at one of the platforms and the yards company refused to deliver them to them.

Q. The time you referred to was during the year 1933?

A. Yes.

Q. Is that correct?

[fol. 372] A. Correct.

Q. At the time those demands were made, and ever since that time, have you been ready and willing to accept and take delivery of all direct shipments at the unloading chutes without requiring any further service by or the use of

other facilities of the Union Stock Yard and Transit Company?

Mr. Smith: Read me that question please, Mr. Reporter.

(Question read.)

A. We have. We have been prepared to and desired to accept direct shipments of livestock at the unloading pens at any hour of the day or night, and to remove them by the shortest egress to a public street, using such route as the carriers or the Union Stock Yard and Transit Company might designate.

Q. If you were permitted to take your direct shipments of livestock from the unloading pens, would it be necessary for you to use the facilities of the stock yard company, which you have above described, such as holding pens, alleys, runways, and so forth, in order to move the livestock to your own plants or adjacent property owned by you?

A. No. Other than the delivery alley, we would not have to use any of their facilities.

Q. Please designate the delivery alley on exhibit 1.

A. The delivery alleys for platforms Nos. 1 and 2 running east and west have egresses off the yard company's property that would permit us to move livestock either to [fol. 373] Emerald Avenue from the east side, or into our own property of the Independent Packing Company on the east side of Halsted Street. At the west end of platforms 1 and 2 there is a gate which would allow us to get out to Packers Avenue. The same thing would apply for platforms and delivery alleys, for platforms Nos. 3 and 4. On the east end of platforms Nos. 2 and 4 there are continuous alleys that terminate at a gate that swings, and access can be had to that viaduct or bridge across Halsted Street and then east some 50 or 70 feet where the runway reverses itself back to the wall running east on the east side of Halsted Street. There a gate may be swung and hogs may come south into the Independent Packing Company property or turn north and then east through an alley that has been used by packers who use that method of egress from the stock yards. That alley as I know it is a city-owned alley, but has been used a good many years by packers who use that method of getting their livestock out of the yards.

By Mr. Smith:

Q. What is that 50 feet that you referred to?

A. After you have gotten off the viaduct, Mr. Smith, probably 50 feet.

Mr. Rynder: Let me suggest that perhaps Mr. Reneker can show that to you better on exhibit 20.

The Witness: It is right here, Mr. Smith (indicating). This is Halsted Street (indicating).

Mr. Rynder: Please get that in the record, so we will [fol. 374] recognize it.

The Witness: This is the bridge across Halsted Street (indicating).

Mr. Smith: Extending from the east end——

The Witness: Extending from the east end of the Union Stock Yard Company's property to the east side of Halsted Street. At a point approximately 50 or 60 feet east of the east end of the viaduct there is a slight turn or incline,—or rather, decline, whichever you want to call it—which goes down, and you come back to the wall that is on the east side of Halsted Street here.

By Mr. Smith:

Q. How far does that viaduct extend east of the east line of Halsted Street?

A. Just to Halsted Street. It extends from the west side of Halsted Street to the east side of Halsted Street.

Mr. Smith: Off the record.

(Discussion outside the record.)

Mr. Smith: Go ahead.

The Witness: All of this property, as I understand, east of Halsted Street beyond the stock yards company's property line here, is on Chicago Junction Railroad property. Now, on the reverse, you go right down to the foot of this runback down to the level of the sidewalk; the street is depressed below the sidewalk for street cars to come; there is a retaining wall there that supports the bridge and also [fol. 375] as a wall there to retain the fill for the railroad. You can turn and go right back under this roadway into the Independent Packing Company property here (indicating), or go slightly north to the back of the old Brennan packing plant and go out through this alley right here to Emerald Avenue (indicating).

By Mr. Smith:

Q. How much of that property east of Halsted Street is the property of the Chicago Junction?

A. From here (indicating) to the lake.

Q. From Halsted Street to the lake?

A. I am not sure what they call it out there.

Q. What is this Independent Packing Company? Is that a subsidiary of Swift and Company?

A. A subsidiary of Swift and Company.

Q. What do you do there? What operations are carried on there?

A. At the present time we use it for outside storage. It is equipped with facilities for slaughtering hogs. Hogs were slaughtered there at the time we purchased the plant. So, this route would carry animals right into our own property, into the door of the Independent Packing Company.

Q. I see. That would be partly over the viaduct of the Union Stock Yards and Transit Company and partly over the property of the Chicago Junction Railroad Company?

A. If that viaduct is owned by them, and I understand it is, yes; that would be true, Mr. Smith.

By Mr. Rynder:

Q. Going back now to the far side of Halsted Street, you [fol. 376] can go across Emerald Avenue over a public alley, is that correct?

A. That is correct.

Q. After having brought your livestock over property owned either by the Union Stock Yard and Transit Company, or by the Chicago Junction?

A. We then have egress to Emerald Avenue on a public alley owned by the city, as I understand it.

By Exam. Carter:

Q. Are you allowed to drive that stock over the public alley?

A. All of the small packers who drive stock east of Halsted Street, that are located in the area around Emerald and Union Avenue use that method of getting out, with their livestock.

By Mr. Rynder:

Q. Mr. Reneker, for the information of the Examiner, to the northwest and slightly beyond this map, are located the

plants of—I mean, the northeast corner of this map, are located the plants of some packers, a dozen of what we might term the smaller packers who have only a Chicago plant?

A. There are several plants over in there. There is the Agar Packing Company; the Illinois Meat Company. I cannot name them all offhand, but there are several plants east of Halsted Street, and north of Root Street.

Q. They use this route that you have mentioned to get their livestock out and over to the plants which are north of Pershing Road as indicated on exhibit 20?

[fol. 377] A. They are not all north of Pershing Road, Mr. Rynder. Some of them are south of Pershing Road.

Q. In what location on the map?

A. The Brennan Packing Company is on the east side of Halsted Street, directly north of the Chicago Junction right of way, and back up to this alley I referred to. The Illinois Meat, I believe, is north of Pershing Road. I would not want to say that definitely. The Agar Company is on Union Avenue, north of Root Street.

Q. And they use this approach to Emerald Avenue and then the streets beyond there to get their livestock to their packing plants?

A. They use it on a great deal of their buy; I would not say all of it. Some of them have trucks that haul their hogs, but they do drive some of their livestock that way.

Q. You personally see them from time to time?

A. Yes, sir. I have, for a good many years.

By Mr. Smith:

Q. They are paying yardage charges on all of that livestock, are they not?

A. Sir?

Q. They are paying yardage charges on that livestock under this tariff you have spoken about, are they not?

A. They would on directs, yes.

Q. Yes.

A. But on anything bought in the yards they are allowed [fol. 378] that egress without any charge whatever.

Q. Without any charge other than that specified in the stock yards tariff that already has taken ahold of those animals?

A. There is no expense now on livestock we buy in the stock yards, nor for any other packer.

Q. No expense to you?
A. No, sir, nor to them, either.
Q. To the other packers who buy in the yards?
A. Yes.
Q. Is that right?
A. Yes.

By Exam. Carter:

Q. That expense has already run against the shipper?
A. Correct.
Q. Is that right?
A. Yes, but they are allowed to take their livestock whether they purchase it or whether it is directs out over that same egress.

Mr. Rynder: Just a moment. I think you have already answered the next question I intended to ask you, but while I think of it, let me ask you this:

By Mr. Rynder:

Q. With reference to Packers Avenue, as to which you have testified as to the joint ownership, is that street open to the public for all purposes?

Mr. Smith: Just a moment, now. He did not testify [fol. 379] about joint ownership. You made the statement, and I accepted it as true.

Mr. Rynder: I asked him. It is on that basis I made the stipulation. If you want me to go back, I will ask that question.

By Mr. Rynder:

Q. Do you know the ownership of Packers Avenue?
A. I understand from our Chicago Real Estate Department—when I speak of "our", I mean Swift and Company's—that Packers Avenue is jointly owned by Libby, McNeil & Libby and Swift and Company. I would not say that was true of all of Packers Avenue, where it runs south of 42nd Street——

Mr. Smith: 42nd or 47th?

The Witness: 42nd—because it then crosses Armour & Company and Miller & Hart and other properties, and I doubt very much if we own it where our property does not

face on it. I do not know any reason why we should, Mr. Smith.

By Mr. Rynder:

Q. Refer now to exhibit No. 20, Mr. Reneker.

A. Yes.

Q. Can you state approximately, on there, where the general offices of Swift and Company and the packing plants of Swift and Company are located?

A. Swift and Company's general office is located on the northeast corner of Exchange Avenue and Packers Avenue. Our property line runs north on that side of the street to [fol. 380] some point very close to the Chicago Junction Railroad tracks on the east side of the street. There is a water tank directly on the southeast corner of Packers Avenue and the Chicago Junction tracks. There is a fire haul next to it. Directly south of the fire haul we have loading and unloading facilities to handle livestock by truck. South of Exchange Avenue our property runs on both sides of Packers Avenue to 42nd Street, then continues west to Ashland Avenue. That also runs east from Packers Avenue parallel with Exchange Avenue to Racine Avenue and south to 42nd Street, and there is a small plot of land on which our employees' garage and mechanical shop and one thing and another are located, on the north side of Exchange Avenue directly in back of the general office. That approximately comprises our plant area.

Q. Have you a facility on your own property north of the general office building for unloading hogs from trucks?

A. We have facilities for unloading all species of livestock.

Q. How is that designated on the map which has been marked exhibit No. 20?

A. It is designated in a yellow outline, directly below No. 53.

Q. Are those facilities suited to unloading all species of livestock from trucks?

A. They are.

Q. On to your own property?

[fol. 381] A. They are.

Q. Do you have a scale for weighing livestock on your own property?

A. We have.

Q. Will you please designate that on exhibit 20?

A. It is located in the building indicated by No. 6, which is located on the northeast corner—or the southeast corner, rather, of our property line at Racine and 42nd Street on the map. It is blocked in there in yellow.

Q. Is that scale of such a nature that all species of livestock received by you can be weighed on it?

A. It is. We could weigh all the livestock that we received on that scale. We have our private driveways to it.

Q. Let me ask you this, whether that scale was constructed by you for the purpose of being able to weigh your own livestock and thereby avoid stock yard service in that connection after these demands were made upon the railroads as indicated in exhibit 20?

A. That scale was installed, I believe, in October of 1933, and after it was installed we weighed practically all of the hogs that we received direct in the Union Stock Yards over that scale that were slaughtered at the Swift and Company plant.

Q. Mr. Reneker, you have explained a possible outlet to the east of the unloading pens across Halsted Street, not by way of demand, but merely by way of suggestion; is there [fol. 382] any other way livestock could be obtained by Swift and Company conveniently from the unloading pens without the use of stock yards property other than the delivery alleys?

A. Stock could be taken from the west end of platform 3.

Q. On exhibit 1?

A. On exhibit 1; and also on exhibit 20.

Q. Yes.

A. To Packers Avenue, where we could drive it across part of the Chicago Junction railroad tracks to our facilities for unloading and loading as indicated on exhibit 20, directly under the numeral 53. Livestock has been delivered out of that gate during the past several years to two or three different firms. The D. Levi people took their cattle out that gate on to Packers Avenue and across to their plant on North of the Chicago Junction tracks. A small hog killer drove his hogs out of there at one time.

Q. I want to revert for a moment to a subject on which you were interrupted, I believe; that was about the use of Packers Avenue as a public street, despite its ownership. I want you to state from your own observation and your own knowledge whether there is any limitation upon the use of that street north of Exchange Avenue.

Mr. Smith: Just a moment. I object to it as incompetent and immaterial. You are speaking now about Packers Avenue?

Mr. Rynder: Yes.

[fol. 383] Mr. Smith: Mr. Rynder and I have stipulated that street has not been dedicated to public use.

Mr. Rynder: Oh, no, we have not. We have stipulated as to ownership.

Mr. Smith: I asked you if it was a public street, and you said "No". That is part of the stipulation.

Mr. Rynder: Then I will withdraw it.

Mr. Smith: If it is owned partly by Libby, McNeil & Libby, they can stop the use of that street on five minutes notice.

Mr. Rynder: I will withdraw that part of the stipulation. If so, I made it under a mistake. I have been in valuation cases where we met that very thing. Although we owned the private street, if we allowed the use of it to the public, we could not be allowed that street in our valuation. The Commission has so held in its valuation cases, and the Secretary of Agriculture has so held in these valuation cases he has had.

Exam. Carter: I think we have some testimony here that Packers Avenue is used by other persons than the owners.

Mr. Rynder: Turn back to that stipulation, Mr. Reporter.

Exam. Carter: And there is nobody prevented from using it. Then we have also a statement by Mr. Smith that he could not accept the stipulation that it was open at all times, because of Mr. Blanchard's statement he made the other afternoon that it has been closed at different times. As I recall it, that was discussed off the record. The record, as [fol. 384] I see it now, does not indicate, or does not establish definitely that Packers Avenue is open at all times to the public. If I am mistaken about the condition of the record in that respect, gentlemen, I would like to be corrected.

Mr. Smith: That is my understanding of the state of the record.

Mr. Rynder: That does not affect the fact, if it is a fact, that it is open to the public at all times—that it is open. The stock yards company allows the use of Racine Avenue to every description of traffic that comes in there, but there are certain hours at night when it is closed. There are certain hours of the night when our public streets are closed. I

am asking Mr. Reneker what he has observed and what he knows as to whether every class and description of traffic passes freely up and down there without any hindrance of any kind.

Mr. Smith: I object to it as immaterial and incompetent.

Exam. Carter: I will overrule your objection and let him answer, subject to Mr. Smith's exception.

The Witness: I have never known of any mode of transportation or traffic to be stopped that travels on that street. Trucks and facilities of all different——

Mr. Rynder: Just a moment. Let us see what kinds.

By Mr. Rynder:

Q. Do all kinds and descriptions of pas-enger cars freely go up and down there?

A. Both passengers and trucks go in and out of Pack- [fol. 385] ing Town, to both Swift and Company and other packers.

Q. Do all kinds of trucks go up and down that street?

A. They do.

Q. Is there any limitation placed upon its use either in connection with passenger cars or trucks?

A. Not to my knowledge.

By Exam. Carter:

Q. Is it closed at any time to any traffic?

A. Not to my knowledge, Mr. Examiner.

Q. Have you known of it to be closed?

A. I have never known of it to be closed. I have never passed through there myself when I have not been able to go in or out without any trouble, and I have never seen anybody stop anybody.

Q. Is there any way it can be closed, by existing facility?

A. If it can be closed, I would say it can be closed by Transit Avenue, on the opposite side of the tracks. I do not believe it can be closed on our side. Transit Avenue is where it empties into, on the north.

Q. Are there any physical facilities there which could be used to close it off?

A. None to my knowledge, on the south side of it.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Now back on the record.

By Mr. Rynder:

Q. In addition to the classes of traffic you have mentioned, [fol. 386] do public taxi cabs go up and down that street either to take or deliver passengers?

A. They do.

Exam. Carter: Will you admit this, Mr. Rynder, that there is some doubt that Packers Avenue is a public street?

Mr. Rynder: No, not that. I admit that it is owned—or, I state as a fact that it is owned jointly by Swift and Company and Libby, McNeil & Libby, but that its use is allowed without discrimination to all persons desiring to use it.

Mr. Smith: Do you deny that Libby, McNeil & Libby can insist upon its being closed at any time they desire?

Mr. Rynder: Yes. I deny that. The street is never closed.

Exam. Carter: Do you go this far, as to maintain it is a public street?

Mr. Rynder: Not in ownership, but as I understand it, the use of the street——

Exam. Carter: I mean, a public street which could be used by the defendants in this case as a means of exit.

Mr. Rynder: Oh, undoubtedly. I contend it is such a street as that.

Mr. Smith: It is not a street that has been dedicated to public use pursuant to the statutes of Illinois and the ordinances of the city of Chicago. That is true, is it not?

Mr. Rynder: That is true, but it is a street——

Exam. Carter: If it is a public street, it is a public street [fol. 387] by reason of the easement the public has acquired from continual use?

Mr. Rynder: Yes.

Exam. Carter: Is that your theory?

Mr. Rynder: Yes.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. How far back does your information go, Mr. Reneker, as to that similar use of Packers Avenue?

A. Well, I started to work for Swift and Company before they were in the general office, and the general office has been there since 1904. I believe that street was in use then,

the same as it is today. Everybody used it in and out of the yards.

Q. Do I understand that to be 1904?

A. 1904.

Q. Was the use of it then the same as to private automobiles, trucks, public cabs and everything else you have mentioned?

A. Yes, it was. It was mostly horses and wagons in those days. There were very few automobiles.

Q. Apart from these outlets you have merely suggested, if the carriers should arrange for egress of your livestock to any public street adjoining the stock yards, could you take it from such point to your plants without again using the property of the Union Stock Yard and Transit Company?

A. What page are you on now?

Q. Sir?

[fol. 388] A. What page?

Q. The bottom of page 8.

A. Page 8?

Mr. Rynder: This is off the record, Mr. Reporter.

(Discussion outside the record.)

Mr. Smith: Read the question please.

(Question read.)

The Witness: The answer is "Yes".

Exam. Carter: We will recess for five minutes.

(Short recess.)

Exam. Carter: Let us resume, gentlemen.

Mr. Smith: Mr. Reporter, read Mr. Rynder's last question of Mr. Reneker and the answer.

(Question and answer read.)

By Mr. Rynder:

Q. How could this be done?

A. From any point that the carriers might designate as the point of egress to a public street from the stock yards, we could move the livestock by truck over public streets, such as Halsted Street, 47th Street, Ashland Avenue, or 39th Street, and then over private streets within the packing house area without coming back into the property of the stock yard company, as designated on exhibit 20.

Q. Is such a movement of livestock to your plants now being performed without the use of any facilities belonging to the Union Stock Yard and Transit Company?

[fol. 389] A. Yes.

Q. Please state what movement this is and how it is performed.

A. We have unloading facilities for livestock at the location of the Omaha Packing Company, 26th and Halsted Streets. At that point we load the livestock in trucks and it moves south on Halsted Street to Archer, southwest on Archer to Ashland, south on Ashland to 42nd Street, and east over 42nd and private property to our own facilities for truck unloading, without passing over any property of the Union Stock Yard and Transit Company.

Q. As you understand our demand upon the carriers in this case, would it be necessary for you, in accepting delivery of direct shipments of livestock, to make any use of the holding pens, runways, tunnels, or viaducts of the Union Stock Yard and Transit Company beyond a mere egress to the street?

A. No.

Q. Would it have been necessary at any time since our demands, as indicated in exhibit 2, were made?

A. No.

Q. If you were afforded direct egress to the nearest public street, would it be necessary for you to use or obtain the use of any scale owned or operated by the Union Stock Yard and Transit Company in order to obtain the hoof weights of the livestock?

A. No. We would not have to use any of their facilities.

[fol. 390] Q. Have you any facilities of your own for this purpose?

A. Yes. As described before, we installed scales in our hog house No. 7 west of Racine Avenue and 42nd Street, where directs have been weighed in the past and could be weighed again if we were afforded the privilege.

Q. You have already shown those?

A. I have shown that location on exhibit 20. The scale was installed in October of 1933, as formerly noted. That was done shortly after our first demand upon the railroads as indicated in the correspondence marked exhibit 2—is that 1 or 2?

Q. Exhibit 2 was the correspondence.

A. —and was installed solely for the purpose of enabling

us to obtain the weights upon direct shipments of livestock without the use of the scales of the Union Stock Yard and Transit Company. This scale is inspected by the Western Weighing & Inspection Bureau operated by and for the account of the railroads. It is operated by a bonded and sworn weighmaster, and the weights there obtained are accepted by the railroads as the basis for settlement of freight charges.

Q. Can you state what the cost would be to you for bringing livestock to your plants if you were afforded an egress to the nearest public street at any point designated by the carriers?

Mr. Smith: I object to that as immaterial.

Mr. Rynder: I think that it and one other item I have mentioned may go to the measure of damages.

[fol. 391] Exam. Carter: The question there was as to the cost to the carriers.

Mr. Rynder: What it would cost us to get it around there.

Exam. Carter: I will overrule the objection.

Mr. Rynder: Let me make that clear, if it is not understood. On cattle we have been paying 45 cents. We are asking for reparation in that amount. I had suggested that one basis for damages, the other day, might be the difference between what that would come to and $3.

Exam. Carter: Yes.

Mr. Rynder: I have in mind now that the Commission might think, "Well, if you do not have those runways to go through, it would cost you something to get over there, so how much are you actually damaged?"

Mr. Smith: Mr. Rynder, you have talked here for a good while today about getting this livestock out right onto the property of Swift and Company. The case is apparently degenerating, on your theory, into putting the stock into the hamburger machine in your plant; now you are proposing to go into the question of what the measure of damage will be, using what it would cost you to get this stock right down into your plant. Is that your idea?

Mr. Rynder: I would like to have Mr. Smith agree with me that the measure of damage would be the entire yardage charge. I would be tickled pink if he would do that. How-

[fol. 392] ever, sometimes a tribunal inquires, "How much were you actually damaged?" So, I am trying to inquire here, if we had had access, or egress to the public street,

assuming also that we would have had to use some labor to reach the same, how much it would cost us.

Exam. Carter: The witness may answer the question.

Mr. Rynder: Sir?

Exam. Carter: The witness may answer the question.

Mr. Rynder: Thank you.

By Mr. Rynder:

Q. Answer the question, please, Mr. Reneker.

A. I cannot give you an exact figure on that, because we have not performed this operation, having been denied the right to do so by the carriers. I can, however, state a figure which will exceed the maximum. We have exact cost figures covering the movement of many thousand heads of livestock over a period of several years from the Omaha Packing Company facilities to our plants in the stock yards area. The distance from the Omaha Packing Company to our plants in the stock yards area is something over three miles. We have kept accurate figures upon the cost of this trucking, and our records show that the average cost of such trucking is 3.5 cents per head on hogs, 15 cents per head on cattle, 3.5 cents per head on calves, and 1.75 cents per head on sheep. The cost of trucking from any point of egress on a public street, adjacent to the property of The Union Stock Yard and Transit Company of Chicago, would neces- [fol. 393] sarily be less than the amounts I have just stated because the total distance would be not more than half the distance from the Omaha plant to our plants in the stock yards area.

Q. I believe there have been some questions asked as to whether this entire stock yards area was not closed all night by gates.

A. Yes.

Q. I want to ask you if railroad trains and trucks are permitted to come into that area at any time of the day or night.

A. Throughout the day and night trucks are entering through the Halsted Street entrance of the stock yards, through the stone gate with livestock that is being delivered to the Union Stock Yard and Transit Company. Trains are arriving and departing throughout the entire day and night, both bringing stock in and taking stock out. There is never a time when stock is not coming in, or practically never a time. There is almost always trains running in there all the time.

Q. Now, there is one question I noted to ask you here that you may have said something about in your previous testimony. There was some talk about the railroad tracks at the west end of the unloading chutes opposite platforms 1 and 3. Have you yourself observed that route being used —excuse me.

Mr. Rynder: Mr. Reporter, go back and read my question, please, as far as it went.

(Question read.)

By Mr. Rynder:

Q. Have you yourself observed that exit being used for [fol. 394] livestock by certain of the packers located nearby?

A. I have seen cattle driven out of the chute alley of platform No. 3, and being taken west to Packers Avenue. I understood they were going to a plant known as the D. Levi plant, which was located over near the old Anglo plant.

Q. About what location would that be on the map, what street?

A. It would be at the north end of Packers Avenue as shown on exhibit 20, where they would go out across the Chicago Junction Railroad tracks onto the street there—I do not know what street that is—that progresses or runs on west from Packers Avenue; it is not shown on this map.

Q. Have you also observed business going out across—or rather, I mean, livestock going out from the east end of the unloading chutes opposite platforms 2 and 4 to the smaller packers located outside of the stock yards area?

A. I not only have observed it, but have driven hogs myself across that viaduct when we were operating the Independent Packing Company. I have observed other packers driving stock out there.

Q. Have you also observed cattle being driven down Racine Avenue to a plant south of the stock yards area?

A. I believe Wimp drives his cattle out Racine Avenue across 47th Street onto Racine Avenue and south to where he turns in. I believe he is at about 48th Street, or 47th Place. Guggenheim also used to drive cattle out on Racine [fol. 395] Avenue and take them to their plant. They are located down near the Miller & Hart and Roberts & Oake plants.

Q. As to these direct shipments, are the forces that would take them away under your immediate direction and supervision?

A. They are on the payroll over which I have supervision.

Mr. Smith: I did not catch that. You let your voice drop.

A. They are on the payroll over which I have direct supervision.

By Mr. Rynder:

Q. Can you take them away as fast as they arrive, based upon experience you have had in the past?

A. Yes, sir. It would only be a matter of increasing our gangs if we needed more. We have plenty of drivers, and have had, though, to handle them as fast as they ever arrived, since any of this litigation started, day and night.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: On the record.

Mr. Rynder: I had intended to ask you a question about the method of yarding sheep, hogs and cattle, but I believe you answered that already.

The Witness: Mr. Smith asked that question.

By Mr. Rynder:

Q. And also you answered a question from the Examiner in that regard?

A. Yes, sir.

Mr. Rynder: That is all on direct.

Exam. Carter: You may cross examine.

[fol. 396] Cross-examination.

By Mr. Smith:

Q. Mr. Reneker, where was this Levi plant located—or where is it located?

A. They were located close to the old Anglo-American plant just north of the Chicago Junction Railroad's tracks, and also north of the extreme north end of Packers Avenue.

Q. How long ago was that?

A. Oh, within the last several years. I think their plant has been moved since then. I am quite sure it has.

Q. For a good while it has been over east of Halsted Street, has it not?

A. I think it has, but nevertheless that egress has been used to get livestock out of the yards.

Q. Any animals driven over the route you mentioned to that plant must have, of course, been some years ago, before it took up its location east of Halsted Street, is that not so?

A. I could almost be exact. It has been about eight years.

Q. Yes.

A. About eight years ago.

Mr. Smith: On this question of private streets versus public streets, Mr. Examiner, my attention has been somewhat, improperly perhaps, diverted from some of this examination, and I do not know whether there is any difference in view between us or not. I see a question and answer here on this manuscript; I would like to ask the witness whether or not it is in the record in that form, and if [fol. 397] it is I think I am satisfied.

By Mr. Smith:

Q. I see here on page 8 this question: "Have you any other suggestion as to how livestock could be obtained by Swift and Company from the unloading pens without the use of stock yards property other than the delivery alleys?" Then follows this answer: "Yes. Livestock could be delivered at the extreme west end of platforms No. 1 and No. 3 and taken to Packers Avenue, which is a private road owned in part by us and which we have the right to use. In the suggestion I have just made, we could reach all of the holding facilities for our plant either over Packers Avenue, a private street which we have the right to use, or by the use of 42nd Street within the stock yard area, which is a private street owned by Swift and Company." Did you so answer?

Mr. Rynder: Is the reporter taking this down?

Exam. Carter: Yes.

Mr. Rynder: If so, can we not shorten it by saying if it is not in the transcript, he would have so answered, if that question had been asked?

Mr. Smith: Did you hear what Mr. Rynder said, Mr. Reporter?

The Reporter: Yes.

Mr. Smith: Read it, please.

(Record read.)

By Mr. Smith:

Q. Would you, Mr. Reneker?

[fol. 398] A. I would have answered it as it was in the transcript. I do not think that entire question was answered.

Mr. Rynder: That is my recollection. But I am saying, for the purpose of trying to get rid of it——

Mr. Smith: If it had been asked that way, he would have answered it that way; that is our stipulation?

Mr. Rynder: Yes, sir.

Mr. Smith: All right.

By Mr. Smith:

Q. How long have you been with Swift and Company? 34 years I think you said.

A. Approximately that.

Q. Where did you start your engagement with Swift and Company?

A. At Chicago.

Q. How long were you at Chicago then?

A. I was here from 1904 until February of 1916.

Q. What were your duties during that period?

A. I started as a messenger boy, as a weight taker and hog driver, and afterwards as a buyer.

Q. You were a buyer when you left in 1916?

A. Yes, sir.

Q. Where did you go?

A. To Winnipeg, Manitoba. I was given supervision of the hog buying in western Canada, in the three prairie provinces.

Q. Where did you ship those hogs to?

A. They were all shipped to the Canadian plants.

[fol. 399] Q. You bought them in the country, did you?

A. No, sir; on the Winnipeg market.

Q. On the Winnipeg market?

A. Yes.

Q. And shipped them where?

A. We shipped them either to Edmonton—or not west, to Edmonton, rather. The hogs were bought on the Winnipeg market and were either killed at Winnipeg or Toronto. We did make one or two shipments to the west coast, to Vancouver during the time when hogs were short in the west.

Q. Who was operating in this area at that time, doing the same type of work.

A. For Swift and Company?

Q. Oh, yes.

A. Our head hog buyer was Mr. Overman.

Q. Where was he buying hogs at that time for the Chicago operations?

A. He had the same supervision I had, over all of Swift and Company's hog buying in the United States, both at Chicago and at all points.

Q. You now supervise their hog buying all over, do you?

A. Yes, sir.

Q. Do you buy hogs on other markets and ship them to Chicago?

A. We buy on other terminal markets such as Sioux Falls, where we do not have a plant, and ship to Chica o, or [fol. 400] wherever we want to kill them. At times when we might receive more stock than we need at some river market point, we may ship them to Chicago or to some eastern point, wherever we can get them killed to the best advantage.

Q. How long has that been the practice of Swift and Company to your knowledge?

A. Oh, it is a good many years.

Q. Well, how many years, to your knowledge? To what extent are you acquainted with the operations of Swift and Company over a period of years in that regard?

A. I think I could say we had stray shipments from other markets perhaps 10 or 15 years ago.

Q. You think you may have bought hogs on some other market and shipped them to Chicago as long as 10 years ago?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir; positive.

Q. What would you say about 20 years ago?

A. That might be true, too.

Q. Do you know?

A. We used to buy hogs at Sioux City before we owned a plant there and shipped them here.

Q. How long ago was that?

A. That was before—that was not before I went to Canada. That was while I was in Canada. I was there about seven years. I do not know what time we started buying. [fol. 401] It would be approximately 15 or 20 years ago.

Q. Well, is it a fair statement that you do not know when operations of that character started?

A. They might have preceded the time I worked for Swift and Company, or started to work for that company; I do not know.

Q. You do not know?

A. No, sir. I do not know just when we started.

Q. It goes back, though, over the period of your connection with Swift and Company, and might have existed prior thereto, is that right?

A. I did not say that.

Q. Well, answer that.

A. I do not know, beyond 15 or 20 years.

Q. In naming the pens or unloading docks now being used at the yards, I do not think you referred to 9 and 10. What was the reason for that omission?

A. No particular reason. They are seldom used. No. 10 is used little or none at all, except when they get a few occasionally, a grand trunk car, or a C. P. R. car. They have to unload stock that comes in from the east in there. They do spot some sheep along that No. 9—wait a minute. 9—I guess it would be directly opposite, south of No. 7; that runs parallel with the sheep pens there.

Q. Mr. Reneker, since there has been some falling off—[fol. 402] A. I might qualify that. Never to my knowledge have we taken delivery of hogs from either of those platforms. That probably was the reason I did not put it in there.

Q. I see. There has been some falling off in rail shipments of livestock to the yards, has there not?

A. Considerable.

Q. And as a result of that some of the unloading docks are used less than others at this time?

A. As I stated before, on account of the falling off, all of the stock that arrives, hogs especially, is being handled in the two divisions that have never been closed, the Burling-

ton and Rock Island divisions. The Cuba division has been open for brief periods during the past two or three years. It naturally facilitates the movement of the livestock both for the yard company and the commission men to have the trains stopped at the No. 1, No. 3, No. 2 and No. 4 platforms, because it is more convenient for them to handle it there.

Q. You said five, six, seven and eight were, I think, used less than they had been formerly?

A. Very considerably less.

Q. Take one like 5; that is used every day, is it not?

A. To some extent, yes; I would say it was.

Q. How does livestock come into the Chicago market? I am referring to livestock generally, directs and other than directs. Does it come in each day one 365th of the years [fol. 403] volume, or is it somewhat of an uneven movement?

A. The first four days of the week, Monday, Tuesday, Wednesday and Thursday are all heavier than Friday and Saturday, which are the days the markets are open, and there are always some deliveries on Sunday. Saturday has been a day in which practically nothing but directs come on the market.

Q. Taking the first four days, of those, Monday is the big day, is it not?

A. Not any longer. Tuesday recently has been running one of our heaviest days.

Q. Bigger than Monday?

A. Yes.

Q. How does that compare with Wednesday?

A. Tuesday is heavier than Wednesday.

Q. Is Wednesday heavier than Thursday?

A. About the same; sometimes a little bit heavier, but more recently it has been running about the same.

Q. Speaking of all stock?

A. Yes.

Q. How does Monday compare with Wednesday and Thursday?

A. Heavier than Wednesday and Thursday.

Q. You testified about some effort to obtain livestock prior to certain times in the morning. Now, I am not clear as to what you had in mind there. Were you attempting to obtain that livestock without the payment of yardage charges?

[fol. 404] A. No, sir. We were trying to get delivery—the

notification to the yard company had already been made, and to the railroads, that any yardage we were paying was being paid under protest, so it made little or no difference as far as the physical end of accepting those hogs were concerned, with my gang.

Q. Yes.

A. We did want to get delivery, though, at all hours, and the yard company told us we could only take delivery between certain hours of the day time.

Q. Wholly apart from any question of paying yardage charges?

A. Correct.

Mr. Smith: I move to strike all of the testimony of the witness with reference to any action taken by Swift and Company or by anybody else with reference to getting this livestock prior to a certain time in the morning, irrespective of the payment of yardage charges as immaterial, and bearing upon no issue in this case.

[fol. 405] Mr. Rynder: I think it has a bearing on the case, because——

Mr. Smith: I would like to know it. I do not understand what the purpose is.

Mr. Rynder: You cannot disconnect all the facts of this case from the demands we made. Certain services have been performed for us involuntarily, and not because of these demands, or because of this complaint; but because under the yard company's rule we could not get in there and do the work ourselves.

Mr. Smith: If the Examiner thinks that is material, I would like to develop some facts in that connection, but I know nothing about it.

Mr. Rynder: The witness's construction, entirely apart from these questions, may be true in part. That is to say, he did not go up there and wave this letter at them, but, finding out we could not get in those yards, it was impossible for us to do the entire service we hoped to do.

Exam. Carter: My own opinion is, the fact that he did send a crew to the yards and requested that the crew be permitted to take delivery of the stock at the unloading pens is not very material in this particular case. However, it may have some materiality, so I will let it stay in.

Mr. Smith: All right then. I want to develop something about it.

[fol. 406] Mr. Rynder: Let me ask one question before we go to another subject, Mr. Smith.

Mr. Smith: We are not going to another subject. I am staying right on this subject.

Mr. Rynder: I just wanted to know if the witness knew what those hours are. I understand it is a general rule of the stock yards. Maybe somebody else knows.

Mr. Smith: That is in the record. Do you want your statement on the record? Do you want to state your understanding in that regard?

Mr. Rynder: I do not care about my understanding. If there is some rule out there that is 7:00 A. M. to 7:00 P. M., or 6:00 to 7:00 P. M., I think it would be well to have it in the record. If the witness does not know it, I would like to find out from somebody else who does know.

Mr. Smith: I am perfectly willing to have it in the record if it has any materiality, which I do not think it does, if the Examiner if willing to hear it.

By Mr. Rynder:

Q. Do you happen to know the hours, Mr. Reneker, regardless of any yardage, within which a receiver of live stock is allowed to go into those unloading pens and remove his live stock through the stock yards facilities or otherwise?

A. Up until this litigation started, I had never known there were any hours. We had never been refused to be [fol. 407] allowed to take stock out of there whenever we wanted, from holding pens or any place else.

By Exam. Carter:

Q. Did you ever attempt to take it out at night?

A. We have driven hogs out of there at eight o'clock or nine o'clock or ten o'clock at night when we were busy and rushed, and lots of hogs were moving through the yards.

By Mr. Smith:

Q. And early in the morning?

A. Yes.

Q. Before seven o'clock, or six o'clock?

A. Five o'clock, and all hours.

Q. Then they clamped down on you and refused to let you do that, as you said, at the time this litigation started?

A. At the time of the——

Q. When was this litigation started?

A. In May of 1933.

By Exam. Carter:

Q. You never did it, except on directs, did you?

A. Sir?

Q. I mean, when you took your stock out at various times during the night and early in the morning, you only did that on directs, did you not?

A. Whether they were local bought or directs that had been in the yards and were yarded, they delivered them to us and we drove them to our plants.

[fol. 408] Q. They delivered them to your employes?

A. That is right.

Q. Within the stock yards?

A. That is right.

Q. Your employes drove them to the plants, drove them outside of the stock yards to your plants?

A. Yes.

Q. On both kinds of shipments, during the night hours and prior to six o'clock in the morning?

A. Yes, sir.

Mr. Rynder: There is one point there I think Mr. Smith will agree to, and I want to make it clear to the Examiner. We would not, for any reason, be over there to get live stock, except directs, because the others go to commission men from whom we purchase them.

Exam. Carter: The witness has testified differently, Mr. Rynder.

The Witness: We would be there, Mr. Rynder, if we were killing at late hours or starting our gangs in the morning, if we would need live stock to carry on the operations.

By Mr. Rynder:

Q. Would you be using the unloading pens to get a carload of live stock you had not bought yet that was consigned to Robinson & Company?

A. No, sir, but we would be there if we had hogs bought the day previous that had been yarded or that had come in [fol. 409] during the night, when we had not had an op-

portunity to take delivery of them, and which had been yarded by the yards company. We then would go and accept that stock and drive it to our plants.

Q. Would that all be direct shipments?

A. No, sir. It would not all be directs. Some would be directs and some would be local bought.

Q. All of these directs would not be in unloading pens would they?

A. No. I did not say that. We would go to holding pens or wherever they would be. I said I had—pardon me. Read my answer there.

Exam. Carter: Just a moment. The fact is this, or this is what I understand your testimony to be, that prior to your demand, that is the demand of Swift and Company upon the railroads and stock yards company, to be permitted to take possession of their live stock, direct shipments of live stock at the unloading pens, your employes never had any difficulty in taking live stock from the stock yards' property to your own property at any hours during the night or prior to six o'clock in the morning.

By Exam. Carter:

Q. Is that correct?

A. We never had, up until then.

Q. You have done that upon various occasions?

A. Yes, sir.

Q. When you attempted to do that subsequent to your [fol. 410] demands upon the railroads and upon the stock yards company, your request was refused and you were not allowed to do it, is that correct?

A. Only after a certain hour in the morning, either six or seven o'clock; I am not just sure which it was.

Q. That time is specified in the letter, I imagine, from the stock yards company to you, is that correct?

A. I presume it is. It all happened five years ago. I know we definitely were there to accept them.

By Mr. Smith:

Q. Well, the upshot of it is you could go in there and get your live stock any time you wanted to, until you made a demand for it without the assessment of any yardage charge, and from that time on they would not let you go in there and get it, except after certain hours regardless of whether

you were willing to pay the yardage charge or not, is that not it?

A. That was true on directs.

Q. Yes.

A. We never had an occasion that I recall when we had to drive local bought stuff later or earlier, because naturally it was bought during the day and it was in there, and we drove it out that day.

By Exam. Carter:

Q. You mean, subsequent to this demand, is that it?

A. After the demand, yes, sir.

[fol. 411] By Mr. Smith:

Q. Well, did you ever get any explanation as to why a demand that you be relieved of paying a yardage charge should have the extraordinary result of the yards not permitting you to get your stock before six or seven o'clock in the morning, regardless of whether you paid the yardage charge or not?

A. I never did get any explanation.

Q. Did you ever ask for one?

A. Indeed we did.

Q. Whom did you ask?

A. The yard company employes, the delivery men.

Q. Did you ever ask Mr. Henkle?

A. No.

Q. How did you make this demand?

A. Went to the delivery men in the chute alley.

Q. Just as the men always had?

A. As they always had.

Q. Sometime in 1933, who told you the rule had been changed and you could not any longer go in prior to a certain time?

A. That is right.

Q. I say, who was that man that told you that?

A. The delivery man in the chute alley. I could not recall right now without looking it up.

Q. To whom did he tell that?

A. To our hog drivers.

[fol. 412] Q. Were you there?

A. No, sir, I was not.

Q. They told you about this?

A. They surely did, because I sent them out there to be there.

Q. And the other practice of being able to get these animals had prevailed for years, had it not?

A. I have driven stock at night and early in the morning.

Q. When your men came back and told you that for some unstated reason you could no longer go in there and get your stock, what did you do about it?

A. Passed it along to the general office.

Q. To you general office?

A. Yes.

Q. You did not do any more about it then, or contact the yards people?

A. I understood that was their position, that they would refuse to deliver it to us. We did not need to make the demand. There was not any use. They said they would not deliver it.

Mr. Smith: I move to strike all of this testimony as hearsay and not being based on the personal knowledge of the witness.

Mr. Rynder: It seems that every time Mr. Smith develops a few facts he does not like on cross-examination, he moves to strike that testimony.

Mr. Smith: When I develop that the witness is testify-[fol. 413] ing as to what somebody told him, I very often do that, Mr. Rynder, and I am going to continue to do it.

Mr. Rynder: A man in a position like that obtains a great deal of information from his subordinates. He has to.

Exam. Carter: Let me ask one question.

By Exam. Carter:

Q. With reference to those employes of yours whose demands for the delivery of the live stock was refused, are they still in your employ?

A. Yes sir.

Q. Do you know who they are?

A. I think we could find out.

Q. You say you can find out from your records who they are?

A. Yes.

Q. Can you find from your records the person by whom the refusal was made?

A. I presume we can, Mr. Examiner.

Exam. Carter: Under those circumstances I will grant your motion, Mr. Smith.

Mr. Smith: I think I might suggest that the circumstances that have been recited, as to how this thing developed, show it does not have a thing in the world to do with this case. I cannot conceive how it would have any connection with it.

Mr. Rynder: I agree with Mr. Smith on that. I do not think it makes any difference as far as this case is con-
[fol. 414] cerned if they refused to let us get in there all day long.

Mr. Smith: You have changed your mind since you have developed that testimony, apparently. We are in agreement, finally.

Mr. Rynder: That was reported to us at the time. We had been advised, in spite of our notification that we could not obtain live stock without the payment of the yardage charges. We were under duress, threatened and everything else, so we figured there was no use of sending men out there every morning just to be refused again, to try to take away the live stock.

Mr. Smith: I think that statement shows you have been talking about two different things here.

Exam. Carter: Proceed, gentlemen.

By Mr. Smith:

Q. You referred to the weighing of this live stock that has been coming in, in the last several years at the U. S. Yards. Where has that live stock actually been weighed?

A. Practically all of the hogs have been weighed on the scale I designated on Exhibit No. 20, the map.

Q. Where have the others been weighed that were not weighed on those scales?

A. On the stock yard company's scale. That is very few of them, though.

Q. What about the others?

[fol. 415] A. Some of the sheep were weighed on the stock yards company scale and some of them on the G. H. Hammond scale.

Q. The G. H. Hammond scale?

A. Yes.

Q. And cattle?

A. Cattle were pretty nearly all weighed on the stock yards company's scales.

Mr. Smith: I think that is all.

Exam. Carter: Are there any further questions of this witness?

Mr. Rynder: Yes.

Redirect examination.

By Mr. Rynder:

Q. There were some questions asked you in your cross-examination Mr. Reneker, about how far back the shipment of hogs from other markets to Swift at Chicago went. I want to ask you whether that was at that time a substantial movement or whether it was rather an occasional movement due to emergencies, somewhat.

A. It was due more to emergencies. We did not start receiving great numbers of directs, until along about the latter part of 1928.

Q. Now, as to those shipments at that time you were not prepared to weigh those shipments, were you?

A. No, sir, we were not.

Q. Had you made any arrangements by which you had [fol. 416] perfected a means of taking them from any egress that might be given to you, by truck to your own plants?

A. No, sir, we had not.

Q. When did this question of whether or not—this question of the yardage on directs begin to become—strike that out. At the time that you were making those occasional shipments from other markets, you well understood, did you not that, shipping to Chicago, you would get them here and have to pay for the use of the yard facilities, pay yardage charges?

A. We did.

Q. About the time these demands were made upon the railroads in 1933, did you prepare yourselves to handle directs in any other manner?

A. As to weighing them, in order to have a suitable sized gang to handle our stock, we increased our gang and installed scales both at Swift and Company and at Hammond & Company to weigh our direct hogs.

Q. Had you also at that time developed trucking facilities capable of handling these hogs around the public streets and then into your plant?

A. The trucking facilities were developed when the Omaha Packing Company plant was destroyed by fire. We haven't

a plant and we haven't a killing floor there. We then started to truck all live stock received at the Omaha Packing plant to the stock yards.

[fol. 417] Q. Was that in about 1932, or 1933?

A. I believe it was August of 1932. I missed it a month. It was July of 1932.

Q. July of 1932?

A. Yes sir.

Q. Did you at that time commence, so to speak, to divert many shipments that otherwise might have been shipments to the stock yards, to the Omaha plant in order to avoid this yardage charge?

A. We did up to our full capacity, at that point.

Q. Did you find it cheaper to have the car taken to the Omaha plant and unload the live stock and truck it to your plant than to pay the yardage charges at the Union Stock Yards?

A. As already stated, it only costs us 3½ cents, 3½ cents a hog to haul it out. We naturally would have had to pay the full yardage, had they come to the yards.

Q. The amounts you stated for hauling here from the Omaha plant would not be far different from the $3.00 charge if the stock yards company were to do this unloading, would it?

A. On the premises it takes about 100 hogs to the car on an average, no it would not.

Mr. Smith: 100 hogs to a what?

The Witness: 100 to a double deck car.

Mr. Smith: A railroad car?

The Witness: Yes, a railroad freight car. On that basis [fol. 418] it would probably cost us 3½ cents to haul out.

By Mr. Ryder:

Q. With reference to this figure you gave of 1¾ cents for sheep, is that within a reasonable range of this $3.00 charge of the stock yards per carload?

A. Reasonable range, yes.

Q. About how far off is it? What would your average loading be?

A. About 200 to the car.

Q. That would be about $3.50?

A. About $3.50.

Q. You stated a truck cost of 15 cents per head on cattle. What would you call an average load of cattle?

A. About 22 head.

Mr. Smith: Mr. Examiner, I think complainants would be afforded an opportunity to offer evidence of this type if the case ever reached that point. I suggest that we not attempt to go into that now. I am certainly not going to.

Mr. Rynder: I do not want to go into it now.

Exam. Carter: I certainly would not be inclined, if it was found they were entitled to damages, to attempt to determine what the measure of damages would be.

Mr. Rynder: I merely brought down one set of shipping documents for examination by defendants. They did not care to examine them. The record will show they were presented. I have suggested here very roughly three measures [fol. 419] of damage. I am not attempting at all to prove it in detail at this time.

Mr. Smith: Mr. Rynder—may we be off the record, Mr. Examiner?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Put this on the record.

Mr. Smith: I wish you would let me see the documents to which you referred.

Mr. Rynder: Let the record show I now tender to Mr. Smith the documents to which we have just been referring, and since they are not part of the record and might become part of our claim for damages, I ask that they be returned to me intact.

Mr. Smith: They will, and very promptly.

Mr. Rynder: Give them back to me, will you please?

Mr. Smith: I certainly will.

Exam. Carter: Are there any further questions?

Mr. Rynder: I beg your pardon?

Exam. Carter: Have you any further questions of Mr. Reneker?

Mr. Rynder: No. I have no further questions.

Mr. Smith: I have one or two questions.

Recross-examination.

By Mr. Smith:

Q. I am not sure I understood your testimony Mr. Rene- [fol. 420] ker. Are you saying now in anticipation of the

carriers and the stock yards acceding to your request, you increased your personnel and added to your forces?

A. We increased them when we started getting a lot of directs. If I inferred what you said, I did not mean it.

Q. I did not think so.

A. No.

Q. You did not go out and hire more men in anticipation that this was going to happen, did you?

A. If we were allowed the privilege of driving at night, I naturally would have had to increase my gang. You could not expect men to work twenty-four hours at a stretch.

Q. But you did not do it?

A. We did not in this case, no, sir.

Q. You did not go out and buy trucks in anticipation that this was going to be granted?

A. We bought trucks when the fire at the Omaha Packing plant occurred in 1932, prior to this action.

Q. As matter of fact, if you had felt it was going to be granted, you would not have bought trucks; you would have that Omaha stuff go to the yards, would you not?

A. If the fire had not occurred at the Omaha Packing plant, they would have still been killing there.

Q. There was a fire there?

A. Yes.

[fol. 421] Q. What I have said is true, is it not?

A. I cannot tell you, because I do not know. I told you, if there was not a fire there, we probably would be still killing them there. I cannot assume something that was not an actuality.

Q. You said something about the cost of moving hogs which you would get possession of on a public street, or animals which were given egress by public street—you spoke about hauling those animals in trucks to your plant. Where would you load those animals, on stock yards property or on a public street?

A. I could not answer that until you told me where you were going to get egress.

Q. Let us say you got egress on Emerald Avenue. Would you load them on Chicago Junction property or would you load them on Emerald Street?

A. I would say we would drive them out along Emerald Avenue to our Independent Packing Company property and load them there.

Q. How far would it be along Emerald Avenue?

A. Just the width of the Chicago Junction railroad tracks.

Q. Suppose you got them at Pershing Road, or 39th, and Laurel. Where would you load them there?

A. I do not know until you tell us.

Q. I am telling you now to assume that; tell me how you [fol. 422] would load them?

A. I could not tell you.

Q. You figured the cost of handling it. You must have had something in mind.

A. I did not figure the cost of handling it. I said that it probably would cost us less. I did not figure the cost of it.

Q. Well, you must have had to make some assumption.

A. No place have I stated that.

Q. You have to make some assumption as to how the animals are going to be loaded, in order to speculate on the cost.

A. I am not assuming anything until we know where we are going to get them.

Q. Assume for the purpose of my question you will get them at Laurel Avenue and 39th Street. Where will you load them?

A. If you will tell us we are going to get them there, I will try to give you an answer.

Mr. Smith: All right.

Exam. Carter: Are there any further questions?

Mr. Smith: No.

Mr. Rynder: Just a moment.

By Mr. Rynder:

Q. Mr. Smith was asking you questions as to whether you did a whole lot of business in anticipation that the railroads would grant your demands in 1933. Is it at any time possible to largely increase your hog loading crews?

[fol. 423] A. We can supplement our crews with public carriers who charge us the same rate——

Q. I am talking about drivers.

A. Drivers, yes; we can put all the drivers on we want any time.

Q. You can put them on over night?

A. As far as carting out from the Omaha Packing Plant is concerned, there are several public cartage companies who will haul for us at the same rate it costs us. In other words we pay them the rates I have already indicated.

Q. You are anticipating me a bit. I want to ask you this: is it easy for you to get additional trucks if you need them?

A. We have never had any difficulty.

Q. Did you, following this demand in 1933, do the one thing that would make it unnecessary for you to use the stock yards facilities, namely, did you put in scales of your own on your own property?

A. In 1933?

Q. Yes sir.

A. We did.

Q. So, if you had been afforded egress at that time you would not have needed to use—you would have provided the only additional facility that — would need to handle your business?

A. That is right.

Mr. Rynder: That is all.

[fol. 424] Exam. Carter: I have one question.

By Exam. Carter:

Q. Mr. Reneker, you are familiar with the service which the railroad performs on direct shipments and also on shipments to commission men, are you not?

A. Yes, sir.

Q. In your opinion is that service which the railroad performs the same in the case of both classes of shipments?

A. They are not similar cases, Mr. Examiner.

Q. I am speaking of the transportation which the railroad performs in both cases.

A. Up to the platforms they are similar, exactly.

Q. It is similar up to the platform, and beyond there it is different?

A. That is right. It depends upon where the transportation ends.

Exam. Carter: That is all. Are there any other questions of this witness?

Mr. Rynder: No, but Mr. Examiner, I believe I forgot to offer Exhibit No. 20, in evidence.

Mr. Smith: I do not think you did offer it.

Exam. Carter: I do not think you offered your Exhibit No. 19 either, Mr. Rynder.

Mr. Rynder: I had it marked for identification, and I filed it with the reporter.

Mr. Smith: I am not sure that you offered it. You had [fol. 425] better offer it.

Mr. Rynder: I now offer Exhibit No. 20, in case I failed to do so.

Exam. Carter: I do not know whether you offered Exhibit No. 19. I am not sure. It has been identified.

Mr. Rynder: That is the bill of lading.

Exam. Carter: Yes.

Mr. Rynder: Then in case I failed to offer Exhibit No. 19, let the record show I now offer both Exhibit No. 19 and Exhibit No. 20.

Exam. Carter: Is there any objection to the receipt in evidence of Exhibits Nos. 19 and 20?

Mr. Smith: No objection.

Exam. Carter: They may be received in evidence.

(Complainants' Exhibits Nos. 19 and 20, Witness Reneker, received in evidence.)

Exam. Carter: Just to make the record clear, let me ask you this:

By Exam. Carter:

Q. The only live stock we are concerned with in this case consists of sheep, hogs, cattle and calves, is that correct?

Mr. Rynder: Is that correct, Mr. Reneker?

The Witness: That is right. We do not handle horses and mules.

By Exam. Carter:

Q. No horses and mules?

A. No, sir.

[fol. 426] Exam. Carter: Mr. Rynder—off the record.

(Discussion outside the record.)

Exam. Carter: Are there any further questions of Mr. Reneker?

(No response.)

Exam. Carter: You are excused, Mr. Reneker.

(Witness excused.)

Exam. Carter: Does that complete the complainants' case in chief?

Mr. Rynder: Yes, sir. That is all.

Exam. Carter: Defendants will now proceed, is that correct?

Mr. Smith: That is right.

Exam. Carter: You may call your first witness.

Mr. Smith: I might say, Mr. Examiner, that after talking to Mr. Rynder about this, it looks as if we might do a week's work in five minutes by reference to some of these other yards.

Exam. Carter: Very well.

Mr. Smith: Mr. Barron, take the stand.

M. J. Barron was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. What is your name please?

A. M. J. Barron.

[fol. 427] Q. You are employed by Swift and Company?

A. That is right.

Q. In what capacity?

A. Handling live stock rate matters in the traffic department.

Q. You have been assisting Mr. Rynder in this case?

A. Yes, sir.

Q. You maintain a list of stock yard tariffs published by various stock yards in the United States?

A. Yes, sir.

Q. You have how many tariffs in that group?

A. 58.

Q. Does that contain the tariffs of all the principal stock yards in the country?

A. Yes, sir.

Q. Do you know whether there are any tariffs published by any stock yards, any public stock yards which are not included in that lost?

A. I could not say positively, but I would say there is a possibility there would be others.

Q. There may be others, and there may not be?

A. I would say there have been some small ones that probably have been posted in the last year or two. We make an effort to keep the list up to date.

Q. Now, will you please state for the record the 58 stock [fol. 428] yards which you say are contained in that list.

A. Atlanta Union Stock Yards, Atlanta, Georgia. Baltimore Union Stockyards, Baltimore, Maryland. Buffalo Stockyards, East Buffalo, New York. Union Stockyards of New Jersey, Benning, D. C. The Union Stock Yard and Transit Company of Chicago. The Cincinnati Union Stock Yard Company. The Cleveland Union Stock Yard Company. Columbus Stock Yards, Columbus, Ohio. Denver Union Stock Yard Company. Detroit Stock Yards. The Union Stock Yard Company of Dayton, Ohio. The El Paso Union Stock Yard Company. The Evansville Union Stock Yards Company. Fort Worth Stock Yards Company. Fort Wayne Union Stock Yards Company. The Belt Railroad and Stock Yard Company, Indianapolis, Indiana. The National Stock Yards, Jacksonville, Florida. The Jersey City Stock Yards Company, Jersey City, New Jersey. Kansas City Stock Yard Company. Bourbon Stock Yard, Louisville, Kentucky. The Union Stock Yard Company, Lancaster, Pennsylvania. The Los-Angeles Union Stock Yard Company. The Lafayette Stock Yard Company, Lafayette, Indiana. The Union Stock Yards, Laredo, Texas. The Milwaukee Union Stock Yards. Union Stock Yard Company, Montgomery, Alabama. The Muncie National Stock Yard Company, Muncie, Indiana. Marion Union Stock Yard Company, Marion, Ohio. Southern Stock Yards, Moultrie, Georgia. The Nashville Union Stock Yards. Newark Stock Yards, Kearney, New Jersey. New England Stock Yards, [fol. 429] East Cambridge, Massachusetts. Union Stock Yards and Market Company, New York City. New Orleans Stock Yard Company. The Ogden Union Stock Yard Company. Oklahoma National Stock Yards Company, Oklahoma City, Oklahoma. Union Stock Yard Company of Omaha. The Pasco Union Stock Yards, Pasco, Washington. The Peoria Union Stock Yards Company, Peoria, Illinois. The West Philadelphia Stock Yard Company, Philadelphia, Pennsylvania. Pittsburgh Joint Stock Yards Company. The Portland Union Stock Yards Company, Portland, Oregon. Pueblo Stock Yard Company, Pueblo, Colorado. St. Paul Union Stock Yards Company, St. Paul, Minnesota. Union Stock Yards, San Antonio, Texas. Salt Lake Union Stock Yards, North Salt Lake, Utah. St. Joseph Stock Yards Company, South St. Joseph, Missouri. St. Louis National Stock Yards, National Stock Yards, Illinois. Un-

ion Stock Yard Company of Seattle. Sioux City Stock Yards Company. Sioux Falls Stock Yards Company. South San Francisco Stock Yards. Spokane Union Stock Yard Company. Stockton Union Stock Yards, Stockton, California. The Western Stock Yards Company, Amarillo, Texas. Toledo Union Stock Yard Company. The Union Stock Yard of Toronto. The Wichita Union Stock Yard Company, Wichita, Kansas.

Q. Is it a correct statement that you have been through these tariffs and familiarized yourself generally with their contents?

A. That is true.

[fol. 430] Q. You have found out of those 58 tariffs the tariffs of 13 stock yards which have been offered here in the record?

A. Yes.

Q. Those 13 yards are the only ones in that list of 58 which relieve the shippers from paying yardage charges on direct shipments where the animals are taken possession of immediately at the unloading pens?

A. That is right.

Q. And the other tariffs, other than those 13, do impose some yardage charge on direct shipments, even though they are taken possession of immediately upon unloading into the unloading chutes?

A. With this qualification: they may not all call it a yardage charge. They may give it a per car charge—or rather, I mean to say, they may call it a per car charge, of some nature, instead of calling it a yardage charge.

Q. I see.

A. That is the only qualification.

Mr. Smith: I would like to say in connection with that question I asked, I am not sure, Mr. Examiner, that all of these 13 relieve the shippers from the payment of any yardage charge where they are taken possession of immediately.

Exam. Carter: You were assuming that for the purpose of your question?

Mr. Smith: Yes. I assumed that for the purpose of the [fol. 431] question. Now Mr. Rynder, may we have this understanding: on my part, I shall not ask you to certify the tariffs that you offered yesterday, and on your part you will not ask me to furnish certified copies of all these tariffs?

Mr. Rynder: That is agreeable; certainly.

Mr. Smith: That is all.

Mr. Rynder: I want to ask Mr. Barron one or two questions.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Put this on the record. These are tariffs not on file with the Interstate Commerce Commission, but they are on file with the Secretary of Agriculture, are they not?

Mr. Smith: Yes. If that is not clear, I will clarify it. I was trying to do that very hastily, and perhaps did it inadequately.

By Mr. Smith:

Q. These 58 tariffs you have in your file to the best of your knowledge and belief are the current tariffs filed by the respective yards which you have named, on file with the Secretary of Agriculture?

A. Well, it is like I told you this morning, that I have not checked all of these in the 58 within recent times so that I could say positively they are the current tariffs on file. We make an effort to do that. As to the others than those [fol. 432] introduced, I could not positively say they are the current tariffs.

Mr. Smith: That is what you told me this morning.

Mr. Rynder: Aren't they to the best of your information?

The Witness: That is right.

Mr. Smith: Yes. He told me that they undertook to keep this book of tariffs up to date, and to the best of his knowledge and belief they are current tariffs.

The Witness: That is right.

Mr. Smith: I think that is what you said here.

Exam. Carter: The witness has so testified, but I assume we can conclude from his testimony that except for these 13 tariffs, there is some charge in addition to the line haul rate when possession of live stock is taken at the unloading chutes.

Mr. Smith: He has specifically testified to that.

Exam. Carter: He has specifically testified to that.

Mr. Rynder: Providing the facilities of these yards are used.

Exam. Carter: Yes.

Mr. Smith: Yes.

Mr. Rynder: And providing delivery is there made.

Mr. Smith: Yes.

Exam. Carter: Are there any further questions?

[fol. 433] Mr. Rynder: I want to ask one or two questions, since we furnished this information.

Cross-examination.

By Mr. Rynder:

Q. Mr. Barron, generally speaking as to the 58 stock yards tariffs that you have mentioned, do you know anything about the local deliveries at the various points, where those tariffs apply? By that I mean, do you know whether at those points the carriers maintain other facilities for the delivery of live stock?

A. No, sir. The answer is, I do not know.

Q. You do not know?

A. That is right.

Q. Do you know, as to those 58 minus 13, whether it is necessary for the receivers of direct shipments to use the stock yards?

A. I know in some instances it is not necessary to use the stock yards on direct shipments.

Q. What do you mean by "some instances"?

A. I know that where we have plants—take, for instance, Omaha: we receive direct shipments outside of the stock yards and take them to our own facilities.

By Mr. Smith:

Q. Would that be similar to the Omaha plant?

A. I mean, at Omaha, Nebraska.

Q. Would that be similar—would that situation be similar to the Omaha Packing Plant here in Chicago?

[fol. 434] A. Although I have never been to Omaha, my knowledge of it is based upon correspondence and other things. It would be better if I would not say. I am not sure.

Mr. Rynder: Wait a minute. I would like to ask Mr. Tally that question then, he being under oath. Do you know whether it is necessary to use the facilities of the Omaha Union Stock Yards Company at Omaha in order to obtain your shipments of directs?

Mr. Tally: It is not necessary to use the Omaha Stock Yards. We receive them at a point called Ryan's Spur which is about a half a block from our packing house in South Omaha, the property being owned by ourselves.

Mr. Rynder: Your property, your packing property, is within the stock yards area?

Mr. Tally: Yes, sir.

Mr. Rynder: How about Kansas City?

Mr. Tally: At Kansas City we have built some chutes for unloading live stock right along side of our plant. The stock is set in at that point and does not come through the stock yards.

Mr. Rynder: Does it take the flat Kansas City rate?

Mr. Tally: It does, yes.

Mr. Rynder: Are there any other points you have in mind, Mr. Barron?

The Witness: Where we received direct shipments?

[fol. 435] Mr. Rynder: Yes.

The Witness: Yes. We receive direct shipments at Los Angeles without going through the stock yards on the line haul rate.

By Mr. Rynder:

Q. Outside of the points that you have named specifically, you do not know as to the 58 minus 13 points what the situation is at those several public stock yards, as to whether a man has to use the facilities of the stock yards or whether he does not?

A. That is right.

Mr. Rynder: That is all.

Mr. Smith: That is all.

Exam. Carter: Are there any further questions of this witness?

(No response.)

Exam. Carter: You are excused, Mr. Barron.

(Witness excused.)

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will adjourn at this time until 9:30 tomorrow morning.

(Whereupon at 4:00 P. M., C. S. T., June 2, 1938, adjourned until 8:30 A. M., C. S. T., June 3, 1938.

[fol. 436] Chicago, Illinois, June 3rd, 1938.
8:30 A. M. (C. S. T.)

Before: Paul O. Carter, Examiner.

Hearing resumed pursuant to adjournment.
Appearances: As heretofore noted.

Proceedings

Exam. Carter: Come to order, gentlemen. You may proceed.

Mr. Rynder: Mr. Examiner, with reference to complainants' Exhibits 5 to 17 inclusive, being tariffs of the various stock yards, I understand Mr. Smith's stipulation of yesterday afternoon to be that under the circumstances these may be received in evidence without certification by the Secretary.

Mr. Smith: Yes. Mr. Rynder is right about that. As the Examiner knows, I objected to the admission of this testimony on the ground it is immaterial and incompetent, but subject to that objection, and without waiving it, the Examiner permitted me to offer certain testimony with reference to the matter and I propose to offer some additional testimony along that line. Part of that testimony consists of a summary statement as to the tariffs of a large number of stock yards, the information being supplied me by Mr. Rynder. It is agreed between Mr. Rynder and me that I need not have certified the tariffs I refer to, nor even [fol. 437] furnish the same physically, and I agree that Mr. Rynder need not have certified the 13 tariffs which he has referred to.

Exam. Carter: Very well.

Mr. Rynder: You still have our papers which make up the one complete transaction. You still have those documents?

Mr. Smith: Yes.

Mr. Rynder: I do not need them back immediately. I just want to be sure we get them.

Mr. Smith: I will return those papers now.

Mr. Rynder: We do not need them. I just wanted to be sure we would get them back before the hearing is over. If the Examiner please, Mr. Smith has consented that I

might recall Mr. Reneker, although I said I had closed my case, for a question or two.

Exam. Carter: Very well.

Mr. Smith: Let the record show I am returning these papers to you Mr. Rynder, that you handed me yesterday.

Mr. Rynder: Very well. Thank you. Mr. Reneker, take the stand again please.

W. T. RENEKER recalled, previously sworn and further testified as follows:

Direct examination.

By Mr. Rynder:

Q. You are the same Mr. Reneker who has been previously sworn and testified in this case?

A. Yes, sir.

[fol. 438] Q. Mr. Reneker, yesterday in answer to a request by Mr. Smith, as I recall it, you stated the proportion of total slaughter by Swift and Company at Chicago, which consisted of live stock purchased on the Union Stock Yards for the year 1937. Have you now figured that percentage for a period of years back?

A. We have figured the percentage of directs we received at Chicago, and the Omaha Packing Company, from 1927 through 1935, of our total kill.

Q. The total kill would consist either of directs or those purchased?

A. Directs and those purchased.

Q. On the yards?

A. Yes, so one automatically shows what the other is.

Q. What you have figured there is the percentage of directs?

A. Yes.

Q. Please then state that for the record for each year.

A. For 1927 we killed at the Chicago plant 4 per cent directs; 1928, 5 per cent; 1929, 34 per cent; 1930, 43 per cent; 1931, 49 per cent; 1932, 41 per cent; 1933, 48 per cent; 1934, 49 per cent; and 1935, 50 per cent.

Q. What led to the large increase in the proportion of your Chicago slaughter of directs?

A. Up until approximately 1928 the Chicago receipts were running, normally, around ten million hogs to twelve mil- [fol. 439] lion hogs a year.

Q. By that you mean the receipts at the Union Stock Yards?

A. The total receipts at the Union Stock Yards.

Q. In Chicago?

A. In Chicago.

Q. Yes.

A. And up until that time with the exception of those shipments we took from other markets, we had not found it necessary to participate in direct buying at country points. The interior packers were fast taking a hold of the receipts in Iowa, particularly.

Q. You mean by that, the interior Iowa packers?

A. The interior Iowa packers.

Q. Go ahead.

A. Their growth was so shutting off the receipts at the Chicago market, that in order for us to procure our requirements, it was necessary that we then participate in the same kind of buying, in other words, buy the hogs where the producer wanted to sell them.

Q. Was that increase in buying in the country accompanied by a reduction of the receipts of hogs on the Chicago market?

A. It was a reduction of the on-sale receipts.

Q. That is what I mean.

A. Yes.

Q. The hogs that were received at the Union Stock Yards [fol. 440] for sale by commission men.

A. Yes.

Q. There was a marked reduction in the number of such hogs?

A. Yes, sir.

Q. Can you state approximately to what extent?

A. Well approximately—just a moment.

Q. You stated it had been running about ten million a year.

A. Approximately, as far as Iowa was concerned, the receipts coming on the Chicago market from Iowa had dwindled back to approximately two million hogs to three million hogs a year, where it had been running around five million to six million.

Q. Five million to six million?

A. Yes.

Q. In saying that the receipts at the Chicago market of the on-sale hogs became inadequate, do you have in mind not only the operations of Swift, but that certain other large and small packers as well as eastern order buyers were all attempting to get a supply out of that market?

A. Undoubtedly other buyers found themselves in the same position. In order to procure their requirements they were obliged to go into direct buying or do without hogs that they would normally have bought on the Chicago market.

Mr. Rynder: I am willing to strike that if it be considered it was not exactly what I intended to elicit from the witness.

[fol. 441] By Mr. Rynder:

Q. What I intended to elicit was this, whether out of the hogs available at Chicago, it was not only Swift who was attempting to get a supply, but also Armour and Wilson and twelve smaller packers plus the eastern order buyers.

A. That is right.

Q. Is that so?

A. That is right.

Q. Now, had some conditions arisen out in the country, especially in Iowa, which led to this condition of shipping to nearby points rather than shipping hogs on to Chicago? If so, explain what this condition was.

A. Economic conditions prior to 1927 and 1928 had changed considerably. About that time good roads, automobiles and radios were becoming more in use. The producer who had been, up until that time accustomed to using the common carrier for the bulk of his live stock movement then found himself in a position where he could avail himself of quick and ready markets. He could listen for the opening markets and if he liked that market he could order a truck to come out to his farm and pick up his hogs, take them to the nearest interior packer or concentration market and the hogs were sold before they would hit the terminal markets.

Q. Such as Chicago?

A. Such as Chicago, or any other terminal market. In [fol. 442] addition to that there were some rules and regu-

lations which were a carry over from the war period when there was a zoning system, as to what service railroads would provide on certain branch lines and main lines, as to the days the producer could load his stock to markets. Some of these zoning systems were continued, and maybe still are being continued, as far as I know. We will take this as an example: we will say the carrier was providing service on a branch line for Tuesday and Thursday and possibly Saturday. You can readily see where a man would receive a market on Monday over his radio that he liked, it would be unnecessary for him to wait until Tuesday, until he could get that service. He could call a truck and move his live stock to one of these concentration or direct points and receive his returns the same day on the market basis.

Q. Would there not be this further proposition working in his mind also, that if the market quotation suited him that day, and he did not sell them that day, the market quotation might be different the next day?

A. The speculation and risk of shipping to market, as to what it would do before his stock arrived, naturally was eliminated. He knew what his cash market would be that day.

Q. Did all of those conditions which in the end amounted to a reduction in receipts of hogs at Chicago, considering also the buyers in addition to Swift, bring about this situa-
[fol. 443] tion that in order to get what you considered an adequate supply for the operation of your plants here, you had to go outside of Chicago to buy your essential hogs?

A. We did.

Mr. Rynder: That is all.

Exam. Carter: You may cross-examine.

Cross-examination.

By Mr. Smith:

Q. Those figures that you read cover hogs alone, do they not?

A. Hogs only, Mr. Smith.

Q. I do not think you gave 1935, did you—or was it 1936 you did not give?

A. I gave 1935. I did not give 1936 because you only asked for 1937, but I have the 1936 number of directs we received—I had better get the full figure for you for 1936.

I will get it before this afternoon, if you want it included, so there will not be any discrepancy. It was not left out intentionally, Mr. Smith.

Q. Now, for 1937, that figure went up to 78 per cent as I understand it.

A. And only 22 per cent of our local bought stuff was in our total kill.

Q. Yes.

A. That is the figure I gave, yes.

Q. What is the percentage you gave for the earliest year [fol. 444] which you mentioned?

A. In 1927, only 4 per cent of our total kill was directs.

Q. So it went from 4 per cent in 1927 to 78 per cent in 1937?

A. That is right.

Q. Is that correct?

A. Well now, up until July of 1932 the hogs that were arriving at the Omaha Packing Company, which are included in our total kill from there on, were being slaughtered at the Omaha Packing Company. So, the two figures are not entirely comparable, although this does include our total directs during that period.

Q. So, the increase was in a relationship of approximately 1 to 20?

A. Approximately, yes.

Q. Is it your testimony that that is the result of the activities of the Iowa packers?

A. Partially. I have qualified that by stating that there was an economic change in the marketing facilities. In other words, prior to that the producer did not have the use of good hard roads, the radio, and trucking facilities, which he then began to enjoy.

Q. Well now, do you want to tell the Commission that the Iowa packers are slaughtering about twenty times as many hogs in 1937 as they did in 1927?

A. No, sir. I would not say that.

[fol. 445] Q. You would not say their business had gone up, or increased in volume in any greater degree than yours, would you?

A. Their increase, from back during war periods to the present time has been tremendous.

Q. Well, you prefer to answer some other question than the one I have asked. I am talking about 1927 to 1937.

A. Their business from 1920 on, especially during the latter part of the 1920's, 1927 and along in there, was increasing, whether they really wanted it to or not. In other words——

Mr. Smith: Mr. Reneker, let us try to get away from this general conversation. Please just confine your answers to my questions.

By Mr. Smith:

Q. You have given two percentages here in connection with the increase from 1927 to 1937.

A. Yes.

Q. If you will be good enough, just consider those two dates in answering my question.

A. Yes.

Q. Tell me if it is not a fact that the business of the Iowa packers has not changed in volume in any different degree in that period than your own?

A. I do not have their figures. I could not tell.

Q. You do not know?

A. No, sir, I do not.

Q. You are unable to say that in hogs slaughtered, the [fol. 446] Iowa packers have experienced any different—or, used any different volume from year to year in the ten year period, than you have?

A. I have not seen figures which would permit me to answer that question.

Q. This result you have delineated here cannot be caused by the fact that any greater number of hogs have been taken by Iowa packers during that period, can it?

A. I do not thing we can assume that, because I cannot answer your question. You probably could answer it yourself Mr. Smith.

Mr. Rynder: Mr. Smith, I think your theory is based upon the idea we did not go out there and get our share of the hogs, which is what Mr. Reneker has just testified we did.

Mr. Smith: You did not do anything to get your share if their business was running along on an even keel. This witness does not know that.

Mr. Rynder: I do not know whether Mr. Reneker knows it, but the Department of Agriculture published statistics showing they had a larger increase in slaughter than any-

body else in the United States. The point I am trying to make is, you are assuming all of these hogs stayed in Iowa, whereas Mr. Reneker's testimony clearly shows when that condition developed we went out there to buy them in competition with the Iowa packers, the interior Iowa packers, [fol. 447] and that was the reason for the increase in directs, not that the interior Iowa packers increased their business by twenty times.

By Mr. Smith:

Q. In your statement yesterday of the cost of handling traffic from the Omaha plant to your Swift plant, how many head of live stock did you figure to the truck in that computation?

A. What we actually carried. In other words, all of the hogs, cattle, sheep and calves that arrived out there were computed into that cost.

Q. I want to know simply how many are carried per truck.

A. The truck numbers vary, Mr. Smith, according to the average weight of the hog. You may have 100 in one truck, and you may only have 40 in another, according to the weight.

Q. Yes.

A. That is why we have never computed it on a truck basis. The average basis we computed it on——

Q. What will the average run on hogs?

A. Our single deck trucks will probably average 40. Our double deck trucks probably will average 75.

Q. How does it run for sheep and cattle?

A. Well, computing on the same weight basis, about, I presume it would run about 12 cattle and 75 sheep and lambs to a single deck truck, or somewhere around 125 to 150 to a double deck truck.

Mr. Smith: That is all I have.

[fol. 448] Exam. Carter: Are there any further questions of the witness?

Mr. Rynder: I have just one or two questions on re-direct.

Redirect examination.

By Mr. Rynder:

Q. My impression is that Mr. Smith has assumed that all of this increase in the slaughtering of hogs in Iowa

meant they were being bought by the interior Iowa packers. Is that a fact?

A. Absolutely not.

Q. Did your company and other companies go in there in order to meet that situation, and bid for the hogs in Iowa against the Iowa packers?

A. Well, as the receipts decreased on the terminal markets, in order to procure our full requirements we were obliged to go out and buy them where they were being sold, and sometimes they were selling to competitors.

Q. One of the largest sections for that purpose is the state of Iowa?

A. That is right. It is the largest hog producing state in the Union. Naturally it would follow that is where the most activity would be.

Q. So you were competing from then on with the interior Iowa packers in their own territory in the purchase of hogs, is that right?

[fol. 449] A. That is right.

Q. It does not follow that the interior Iowa packers' business went up by the amount of hogs bought in Iowa?

A. It would not follow that it either went up or down.

Q. No. Now, just to repeat for a moment, where do you get the really big jump there?

A. The jump occurs between 1929 and 1930. We went from 9 per cent to 34 per cent.

Q. From 9 per cent in 1928?

A. Yes.

Q. To 34 per cent in 1929?

A. Yes.

Q. Then what you said about from 1929 to 1930 should be modified by that last statement?

A. Yes.

Q. You said, 1929 to 1930.

A. It should be 1928, to 1929.

Mr. Rynder: That is all.

Recross-examination.

By Mr. Smith:

Q. The hogs for sale on the Chicago market decreased as you increased your buying of those hogs in the country, thus preventing them from coming in for sale on the Chicago market, is that not so?

A. Naturally they were directs and were no longer on sale, Mr. Smith.

[fol. 450] Q. Precisely.

A. Yes.

Q. If the Iowa packers did not use any more hogs in this ten year period than they did before, why did you have to go out to Iowa to get hogs?

A. For the simple reason, as I stated before, that the economic conditions of marketing had so changed, it was a question of whether we would get any hogs if it continued.

Q. Why wouldn't you, if the Iowa packers were not increasing their business?

A. I do not know.

Q. What would happen to the hogs?

A. I do not know how much they would have increased if we had not done what we did.

Mr. Smith: I see. That is all.

The Witness: They may have increased all of that per cent.

Mr. Rynder: May I make this comment: I think Mr. Smith's examination is based upon a designed misunderstanding of the facts. The situation described here has been that the——

Mr. Smith: I object to counsel making a speech. He has not objected——

Mr. Rynder: Mr. Smith has tried to suggest——

Mr. Smith: I object.

Mr. Rynder: —that the interior Iowa packers were out [fol. 451] there with a Chinese wall around them. They were not. The testimony of Mr. Reneker——

Mr. Smith: I think counsel does not need to make a speech. He could have made a specific objection any time he wanted to.

Exam. Carter: Let us stop the argument gentlemen. Are there any further questions of this witness?

Mr. Blanchard: I have a question.

By Mr. Blanchard:

Q. Mr. Reneker.

A. Yes.

Q. Do you recall back about 1925 and 1926 what the condition of the state highway system of Iowa was at that time as compared to today?

A. Indeed I do. I was stuck in the mud a good many times over some of the roads that are now main highways, concrete highways.

Q. Is it not a fact that even at that time, the Lincoln Highway west of Cedar Rapids, Iowa, was not paved?

A. That is right.

Q. Is it not a fact at that time there were long periods in the spring and fall when the Lincoln Highway was impassable into Cedar Rapids?

A. Not only the Lincoln Highway, but a great many other roads that are now main arteries through Iowa.

Q. Where are the Iowa packers' plants located?

[fol. 452] A. Rath is at Waterloo. The former Decker plant is at Mason City. Sinclair is at Cedar Rapids. Morrell is at Ottumwa.

Q. The former Iowa Packing Company at Des Moines?

A. The former Iowa Packing Company at Des Moines.

Q. Is it not a fact that today as compared with ten years ago——

Mr. Rynder: Were there not more Iowa packing plants out there?

The Witness: There are now, but there were not then.

Mr. Rynder: I see.

By Mr. Blanchard:

Q. Is it not a fact that today every one of those points can be reached by concrete highway from practically any point on the main highways within 200 miles?

A. Yes.

Q. In all directions?

A. That is a fact.

Q. Was that, or any situation like that, true in 1926?

A. No, sir it was not.

Q. What was the change in condition, if any, then caused by this highway development of the Iowa farmer as to having a cash market for his hogs at his door, practically every day of the year that he could reach, rain or shine, snow or fog or whatnot?

A. As I have already stated, it was an economic condition over which the interior packers had no control whatever. It was a condition of changing times, of good roads, trucks and the radio, and the producer was continuing to pour hogs into interior packers because it was an available

[fol. 453] market for him, and whether the interior packer had a great desire to grow or not, he was almost forced to grow by the amount of stock that was coming to his plants.

Q. With reference to that available market, is that market which he can now reach practically irregardless of weather conditions, and was that true in 1926 or 1927?

A. Conditions have changed considerably. Naturally he could not reach it at all times then. The roads did not permit the traffic to move at all times then, but now with practically all main highways and a good many of the lesser arteries paved and with a good many of the old so-called lanes at least graveled, now, no longer do we look upon bad weather as a reason for stoppage of receipts. They flow practically continuously, regardless of that.

Q. Was that true in 1926, as far as the interior Iowa plants were concerned?

A. No, it was not any more true than I have said Mr. Blanchard. They did not have the roads.

Q. Mr. Reneker, were the five Iowa plants you have named, namely, Waterloo, Mason City, Ottumwa, Cedar Rapids, and Des Moines, the only packing plants local in Iowa in operation from ten to fifteen years ago?

A. That is all to my knowledge. There were a few——

Q. Except local slaughterers?

[fol. 454] A. There were some small slaughterers. There was Kohrs at Davenport. I believe that is where he is located.

Q. I am speaking of interior Iowa, off-the-river cities. At what points in Iowa since 1927 have new packing plants been opened or built—since 1927?

A. There is a new one at Fort Dodge, Iowa. There is a new one at Storm Lake, Iowa. There is a new one at Estherville, Iowa.

Q. How about Marshalltown?

A. Marshalltown, Iowa—Marshalltown had operated at one time prior to 1930 and then were closed for a spell. I do not know how long that was. Then they re-opened again.

Q. But, whatever the capacity or the actual slaughter of those new plants is, there is certainly an increase in the packing of Iowa hogs in Iowa to that extent, is there not?

A. Yes, there is.

Q. Were you the only Chicago packer who went to the country to buy hogs about the time you named?

A. Indeed we were not.

Q. Who else went?

A. Practically all packers, both large and small packers.

Q. Did you ever hear of such a thing as Armour buying stations and concentration points in Iowa prior to this changed economic condition you referred to?

A. I did, a good many of them.

Q. I say, did you ever hear of direct buying before this time?

[fol. 455] A. Not prior to that, no.

Q. Beginning with 1927 were there numerous and constantly increasing buying stations opened in Iowa by Armour and Company with which you had to compete in your purchases, since this changed economic condition?

A. I could not say whether Armour had opened stations prior to us or after us, but approximately at the same time all packers in an attempt to procure their requirements went into direct buying. They had to do that in order to procure enough hogs to operate their Chicago plants and other plants.

Q. So that unless there was some economic condition requiring it, the only conclusion that may be drawn from Mr. Smith's theory is that all the Chicago packers were idiots about that time; is that a fair statement, that they went out there to buy when they did not have to at all?

A. I would not say——

Mr. Blanchard: I will withdraw that question.

The Witness: I would not go so far as to say they were idiots.

Exam. Carter: Strike that question.

Mr. Blanchard: Yes, strike it.

Exam. Carter: Have you any further questions, Mr. Blanchard?

Mr. Blanchard: That is all I have.

Mr. Rynder: I had just one more question about this [fol. 456] change that you have been speaking of:

By Mr. Rynder:

Q. Up to the time hard roads and the trucks became a factor, did the farmer have to wait until he could market a carload of live stock?

A. As stated before, service that——

Q. No: I did not mean that. I mean, did he have to get a carload quantity to market?

A. Either he had to have a carload himself, either a full carload of hogs or a mixed car, or he had to combine them in cooperative shipments. It was not the practice at that time to market hogs in small lots as extensively as it is today.

Q. In other words, a carload had to be shipped?

A. In carloads, practically, was the only way hogs were shipped.

Q. And that was the only way you could ship them, on the carload rate?

A. That is right.

Q. Did that frequently lead to this practice, that a man set himself up as a hog buyer and got, say, ten hogs from A, fifteen hogs from B, and twenty hogs from C, to make up a carload?

A. The man who formerly has been called a drover, and afterwards a shipper, would go through the country and buy small lots of hogs, or loads from producers and he then would combine those lots and make carload shipments to terminal markets.

Q. Was that a very common practice and very common form of employment?

[fol. 457] A. It was the greatest method of marketing up until that time.

Q. Did that put a middleman between this producer of the hogs and the purchaser of them?

A. There always had been, practically, up until that time.

Q. I mean, did the trader, dealer or shipper, buy his hogs on such a basis that he thought he could make a profit in selling them to some packer?

A. He did, yes. He bought them with a wide enough spread, that he could afford to pay the freight, stand the shrink, any cripples or deads, the market fluctuations, yardage, commission, and so forth. That spread ran all the way from 75 cents per hundredweight to, in some cases as much as $1.25 per hundredweight.

Q. When you came into the period of hard roads, trucks and daily radio reports of markets, was this actual producer of the hogs in a position to market 8 or 10 or 15 or 20 hogs anytime to his cash customer without any intermediary?

A. He was.

Q. Was that a thing that had some effect on the change?

A. It had a tremendous effect on the change. The shipper

then passed out of the picture and it became a proposition of producer-to-market.

Q. In other words, the producer sold direct to the packer?

A. He had the opportunity, and in many, many cases availed himself of it. Today there are very, very few shippers left, who ship on market.

[fol. 458] Q. Was that one of the factors that led to the direct marketing of hogs by producers of hogs, the cutting out of the middleman?

A. It was. It was the result of the facts, more than one of the factors.

Q. It is a thing that occurred, anyway?

A. Yes, sir.

Mr. Rynder: That is all.

By Mr. Smith:

Q. Is it not true Mr. Reneker, that Swift and Company buys a hog in the country instead of on the Chicago market because when the hog has been slaughtered it has cost Swift less than if it had bought it at the Chicago market?

A. That is not true.

Q. Does it cost more?

A. If that is necessary to be answered, I will answer it.

Mr. Rynder: Yes. I think it is a fair question.

The Witness: Yes. It costs us more.

By Mr. Smith:

Q. It costs you more?

A. Yes, sir.

Mr. Smith: That is all.

Exam. Carter: Mr. Reneker, right on that point, let me ask you this:

By Exam. Carter:

Q. Why do you buy hogs that way?

A. Because we have to compete with the competing meth-[fol. 459] ods of marketing in order to procure our requirements. In other words, if we sit in Chicago and wait for the receipts to come here, there will not be enough hogs on sale for our requirements.

Q. This new method of marketing hogs, theoretically at least, results in higher prices to the producer, is that not correct?

A. Yes, and the government's reports on direct marketing so show.

Exam. Carter: Are there any further questions of the witness?

Mr. Rynder: Just a moment.

By Mr. Rynder:

Q. Mr. Reneker, as to your statement it costs more to buy your hogs in the country, but nevertheless you do it—what is the reason for that? Can one of the hog buygrs under you in Chicago buy, if they are available, say, one thousand or two thousand hogs in a day?

A. Well, naturally, the expense of having additional buying units increases. In other words, if there were sufficient receipts upon the Chicago yards to fill our full requirements, one organization in Chicago could procure all of those hogs we need, and with one or two buyers in each division when they were all operating, we could buy all of our hogs, with, say ten to fourteen buyers operating here. Naturally when we open up eight or ten different points in Iowa, those stations all require from two to three men for our requirements, and the expense increases in propor- [fol. 460] tion to the unit cost of buying.

By Exam. Carter:

Q. Then it does not necessarily follow that the producer receives a higher price, but, your expense having been increased, that might account for at least part of the higher price you have to pay?

A. He received higher prices, Mr. Examiner, through the competition which was engendered by this method. In other words, where he formerly had only the shipper or drover who travelled through his territory to deal with, he could then call on the phone five or six different people and say "What are you paying for good 200 pound hogs today?" and before he ever moved the hogs off his farm, he could have as many as a half a dozen different quotations if he called. He could take them wherever he wanted to go. Naturally, in competitive bidding there would be bound to be an increase in what he would receive out of it.

Q. Would not the price the competitive bidding took be the Chicago price? I do not see any use of pursuing it too far. I am just curious.

A. Naturally the Chicago price would prevail, as far as the spread between what he would receive and what he could have received at Chicago is concerned, but there have been times in Iowa when hogs have sold as high as the Chicago market, when competition was keen enough among the interior packers.

Mr. Rynder: I would like to pursue that just about one [fol. 461] more question, since we are into it.

By Mr. Rynder:

Q. You say that the producer got a better price for his hogs. In this whole transaction, were not certain expenses escaped which could be shared with the producer of the hogs? By that, I mean if the producer of the hogs put his hogs on trains for Chicago he bore all the marketing charges at Chicago, did he not?

A. Either he or the shipper who shipped them did, yes, sir.

Q. Whoever shipped them?

A. Yes.

Q. They bore all the marketing charges?

A. Yes.

Q. Those include commission men's charges?

A. They include all marketing charges, yardage, commission, and so forth.

Q. There would be a yardage charge at the Chicago yards?

A. Freight and everything, in the handling of those——

Q. I am trying to get the things—there would be freight in there anyway?

A. Yes, sir; there would be freight and yardage.

Q. Let us leave out the freight, for I assume that would occur anyway. If he marketed them at a terminal market, whether Chicago or otherwise, he would at least be paying out of his own pocket the commission merchant's commission, would he not?

A. He would.

[fol. 462] Q. And the feed that was usually given the animals on the terminal market?

A. Yes, sir,

Q. And standing the shrinkage that occurred during the transportation?

A. Yes, sir.

Q. And the yardage at the terminal market?

A. Yes, sir, he would.

Q. Now, are those charges incurred by either the producer or by you as a purchaser when your hogs are bought direct? Let us say first, does anybody in the transaction have to pay a commission fee to a commission man?

A. No, sir.

Q. Does anybody have to pay for feed on the terminal market?

A. No, sir.

Q. Does anybody have to pay a yardage charge?

A. Unfortunately we have been obliged to.

Q. We have been obliged to at Chicago?

A. Yes.

Q. But you escape all of that stuff on your directs to market?

A. On all we brought into Omaha we escaped it, yes, sir.

Q. Has not that method of getting together left a leeway there of some dollars per car which you are enabled at least to share with the producer?

A. We certainly did, and quite liberally.

[fol. 463] By Mr. Blanchard:

Q. Mr. Reneker, if all of these things——

By Exam. Carter:

Q. That would be true, unless the price paid were not the Chicago price. It would not be true if the price paid to the producer or shipper was not the Chicago price, would it?

A. Well, if it costs him 75 cents per hundredweight to put hogs on the Chicago market for sale, and we could buy those hogs and not have all of that expense and it only added up to 60 cents per hundredweight for us, we could buy the hogs at 60 cents under the Chicago market, and he would gain by 15 cents per hundredweight.

Q. That is when you share that difference with him?

A. Yes.

Q. And you say you do in certain instances?

A. Yes.

Q. Well, if it were bought strictly on the Chicago price, he would receive no benefit, would he?

A. If all allowances were made by us of what it would have cost him and then we bought with that spread, no he would not. You are right, Mr. Examiner.

By Mr. Rynder:

Q. Have you been able to buy that way?

A. We have not.

[fol. 464] By Mr. Blanchard:

Q. Mr. Reneker, assuming that all of those things are figured out so the farmer nets—take a farmer 30 miles from Ottumwa: say he figures he will net the same amount of money by going 30 miles to Ottumwa as he will by going 300 miles to Chicago. Does the farmer in such a case show any preference for his nearby market as compared to his long distance market?

A. He naturally does, because he can haul to that nearby market and come home within an hour with his check. If he loads for Chicago, 300 miles away, he must load them today for delivery tomorrow, and he does not know what Chicago's market is going to be tomorrow; so, naturally he has what you might call a closed transaction, when he ships to his nearby market.

Exam. Carter: Having been in the farming business myself, I know that the farmer desires cash as soon as he can possibly get it.

By Mr. Blanchard:

Q. In other words, he goes to Ottumwa, and he can get his money and be back and plow corn all afternoon, whereas if he ships to Chicago, he has to go to the rail head, put them on a train and then he can go back and plow corn all afternoon, but he will have to wait four or five days for his money?

A. I do not know what he would do, but he certainly would have more time to handle his own business. All of those conditions were brought about by economic conditions——

[fol. 465] Exam. Carter: Let us not go too much into detail.

The Witness: I will state this one fact:—if you want it in there all right; if you don't, all right—but I just want to mention it: as a reverse condition of the effect of good roads and automobiles, up until about the same time the large mail order houses enjoyed a tremendous mail order business out of their Chicago houses. Just about that time, when the good roads and automobiles came in, the farmer and consumer no longer wanted to order everything from a catalogue. He wanted to drive on the good roads to the nearest large town. So, Sears Roebuck and Montgomery Ward had to open stores through Iowa and in other districts in order to maintain their business. It was just the reverse, but it is a parallel case as to what happened in commerce and in trade, and something over which they had no more control than we had.

By Mr. Smith:

Q. Mr. Reneker, these factors which have operated to increase your direct buying some twentyfold in ten years, have apparently been very powerful economic factors, whatever they may be, have they not, the kind you have described?

A. Yes, they certainly have.

Q. It appears that they are operating very rapidly in the direction of the annihilation of the central market, are they not?

A. The central markets have suffered more than anybody else.

Q. Yes.

A. Probably, though, the carrier has suffered more than [fol. 466] anybody by the fact that it no longer gets the amount of haul it did, due to the truck operations. The carrier has suffered more than the yards, I believe.

Q. When the shipper sells in the country he always knows the Chicago price, does he not?

A. So much so that it is a standing joke, almost, in the country.

Q. Well, just leaving aside for the moment, until redirect, the jokes, just answer my question.

A. In most questions he does.

Q. All right.

A. All he has to do is turn on the radio and the service is available for him as early as 9 o'clock in the morning.

Q. And if the vitality of the Chicago market is broken

down by constantly increasing purchases in the country, just to that extent, this Chicago price may as a result of diminishing competition there, cease to be a very safe criterion for that farmer in the country, is that not so?

A. Whether competition will cease—well, as I have already stated, there have been times when Chicago prices have been paid in Iowa for hogs, the full Chicago prices.

Q. Because of the competition in the country?

A. Yes.

Q. So you are going to substitute competition out on the farm for competition in the central market, is that not what [fol. 467] it comes to?

A. We may be forced to, if we want to procure our requirements.

Mr. Smith: That is all.

The Witness: To meet the demands.

Exam. Carter: Are there any further questions?

Mr. Rynder: I myself thought this was unnecessary. I thought Mr. Smith's request was utterly immaterial to this case, but I replied to his request and offered this additional testimony, because I was primarily of the belief that Mr. Smith thought the mere fact we, as businessmen, were purchasing livestock direct, violated some part of the Ten Commandments—I do not know which—the Mosaic law, the tenets of the church, the statutes of the United States, and the state, and was an offense against good morals.

Mr. Smith: I am sorry, Mr. Rynder, but I do not have the background to permit me to reply to that.

Mr. Blanchard: May I have permission, Mr. Examiner, at this time to give reference to a docket number decision of the Secretary of Agriculture where this entire question of the effect of direct buying on industry and on the livestock producer was considered and found by the secretary to be a beneficial practice. I would like to have that in the record, just in case the Commission wants to see what the Secretary thought about what Mr. Smith so strenuously is criticizing.

Exam. Carter: Do you have the reference?

[fol. 468] Mr. Blanchard: I will have it. I have it in the office. I would like to supply it within ten days.

Mr. Smith: I object to anything being supplied in ten days, offered in any such manner as that. I do not know what he is talking about.

Mr. Blanchard: That is very obvious, Mr. Smith.

Exam. Carter: I think, Mr. Blanchard, you ought to offer it at this hearing.

Mr. Blanchard: I think I can call up and get the docket number this afternoon and the title of the case. That is all I want to refer to.

Exam. Carter: Suppose you defer your offer until you get that.

Mr. Blanchard: I will get it during the noon hour.

Exam. Carter: Are there any further questions of Mr. Reneker at this time?

(No response.)

Exam. Carter: You are excused, Mr. Reneker.

(Witness excused.)

Exam. Carter: Call your next witness, Mr. Smith.

Mr. Smith: I will call Mr. Sperry.

R. A. SPERRY was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.

[fol. 469] A. R. A. Sperry.

Q. What is your occupation?

A. I am Tariff Publishing Agent for the Illinois carriers and chairman of the Illinois Freight Association.

Q. With headquarters at Chicago?

A. Yes, sir.

Q. What is the Illinois Freight Association of which you are the chairman?

A. The Illinois Freight Association is a non-profit organization, comprised of a number of subordinate committees, maintained by the rail carriers to afford a convenient and economical medium for the exchange of ideas and dissemination of information among railroad representatives with respect to freight rates, rules, regulations and traffic practices within the territory coming within the jurisdiction of the Association.

Q. Are the lines named as defendants in this proceeding members of the Illinois Freight Association, or one of its subordinate bodies?

A. Yes.

Q. Have you made a study of the application of interstate rates on ordinary livestock to the Chicago area published and maintained by the defendant carriers, and of the terminal services and facilities available in connection therewith?

A. I have.

Q. Will you proceed to state the result of that study, [fol. 470] please, dealing somewhat fully with the situation as to a typical western and eastern line and then referring only briefly to the others.

A. I shall begin——

Mr. Smith: I might say that I think a large part of this information is covered in one of the tariff exhibits offered by complainants, but we have not had an opportunity to adjust ourselves to that.

By Mr. Smith:

Q. Just proceed with your statement, Mr. Sperry.

A. I shall begin with the Chicago, Burlington & Quincy Railroad, which is one of the heaviest livestock carrying roads to Chicago. Throughout this statement I shall deal only with the interstate rates, and, simply as a matter of convenience, I shall refer to the line haul rates to Chicago maintained by the individual line haul carriers as the "flat Chicago rate." On livestock brought into the Chicago area by the Burlington Railroad, the flat Chicago rate applies as follows: one, to industries, chutes or sidings of the Union Stock Yard and Transit Company on the rails of the Chicago Junction Railway of the Union Stock Yard and Transit Company, but does not cover delivery at other facilities of the Chicago Junction Railway. The Burlington line haul rates on livestock to Chicago are carried in a number of tariffs, each covering certain origin territory. Typical of these is the Burlington Railroad Tariff, ICC 19071, which among other things covers rates from specified stations in Iowa, Missouri, Kansas and Nebraska to Chicago, Illinois. The rates so published to Chicago, Illi- [fol. 471] nois, are by the provisions of Rate Basis No. 6 of Chicago Switching Committee Tariff 20-V, Agent R. A.

Sperry's ICC 365, extended to apply also to industries, chutes or sidings of the Union Stock Yard and Transit Company at the Union Stock Yards, Chicago, Illinois. Rate Basis No. 6, referred to, also covers the payment of specific amounts to the Union Stock Yard and Transit Company for its common carrier services of unloading the livestock into suitable pens. These amounts as of this date agree with amounts published in U. S. Y. & T. Co. ICC 12. The Burlington's flat Chicago rates on livestock carried in the tariffs referred to, thus covers the movement of the livestock to Chicago and the unloading thereof into suitable pens at the Union Stock Yards. Two, the Burlington's flat Chicago rates on livestock also applies to its so-called Clyde Stock Yards located at 60th Avenue and 31st Street, in the City of Chicago. This application is carried in line haul tariffs of the Burlington Railroad, of which as stated, ICC 19071 is typical,——

Mr. Rynder: Mr. Examiner, I would like to expedite this all I can, but I think the witness is stating rapidly in addition to facts, which is what the tariff contains, conclusions of his own which are in effect matters of law.

Exam. Carter: Would you go a little slower, Mr. Sperry, so we can follow you?

The Witness: Yes.

[fol. 472] Mr. Rynder: There are two ways to expedite this. I certainly do not want to delay it. I can let him read through to the end and then move that everything be stricken except the statements of fact; that no conclusions either heretofore given or hereafter given shall be considered as evidence.

Mr. Smith: Well, now, Mr. Rynder, I think there is an easier way to do it than that.

Mr. Rynder: May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will take a ten minute recess.

(Short recess.)

Exam. Carter: Come to order, gentlemen. You may proceed.

Mr. Smith: Mr. Reporter, will you read the last statement of the witness so he can get the connection.

(Record read.)

The Witness: (Continuing) —in conjunction with C. B. & Q. ICC 19033, which is a so-called rules circular covering livestock traffic.

Exam. Carter: Do not go too fast, Mr. Sperry, because Mr. Rynder may object, and I may not have gotten what you said.

The Witness: I will try to hold it down.

Exam. Carter: Proceed.

The Witness: The Clyde Stock Yards is not a public stock yards as defined in the Packers and Stock Yards Act, [fol. 473] and livestock delivered at that point must be unloaded by the consignee thereof, but no yardage or other charges in addition to the flat Chicago rate apply. Three, the Burlington's flat Chicago rates on livestock also apply to all of its team tracks located in the City of Chicago, certain of which are located at 16th Street and Racine Avenue. These rates are carried in the various line haul tariffs of the Burlington Railroad, of which, as stated above ICC 19071 is typical. Livestock consigned and delivered to consignees on these tracks must also be unloaded by the consignees, but no yardage or other charges in addition to the flat Chicago rate apply. Four, the flat Chicago rates of the Burlington Railroad also apply to the plant of the Omaha Packing Company located on the rails of the Burlington Railroad in the so-called Lumber District, which application is provided under the provisions of Index 256 of Agent R. A. Sperry's ICC 365. Livestock delivered at this industry must be unloaded by the consignee but no yardage or other charge in addition to the flat Chicago rate apply. I should say in passing that some of the Burlington team tracks to which the flat Chicago rates apply on livestock, are located in the vicinity of the Omaha Packing Company plant and within the so-called Lumber District. Five, under the effective tariffs, Swift and Company or Hammond & Company may obtain delivery of livestock on their industry tracks by the payment of the flat Chicago rates under the line haul tariffs, already referred [fol. 474] to, plus the switching charge of the Chicago Junction Railway carried in its ICC CJ62 of that company in the amount of 3¼ cents, minimum 60,000 ($19.50) per car. Livestock so handled must be unloaded by the consignee, but no yardage or other charges in addition to those re-

ferred to above, apply. What I have said with respect to the rates and facilities maintained and provided by the Burlington is typical of the situation with respect to each of the other western lines handling livestock to Chicago. The applicable joint switching tariff, that is, Chicago-Switching Committee Tariff 20-V, Agent R. A. Sperry's ICC 365, and the tariff of the Chicago Junction Railway are the same regardless of which of the western line haul carriers bring the stock to Chicago. For the sake of brevity in dealing with the remaining western lines, I shall give in skeleton form, reference to a typical tariff of the respective individual lines carrying the flat Chicago rates, to the location of the individual line's facilities, of the nature referred to in connection with the Burlington. For the Chicago, Milwaukee, St. Paul & Pacific Railroad, a typical line haul tariff is that company's ICC B-6612. The Milwaukee's livestock unloading facilities are known as the Bensenville Yard, located within the Chicago switching district. Flat Chicago rates apply. All team tracks are located in the City of Chicago, including the so-called Union Street team track, located at Carroll avenue between Clinton and Union Streets where livestock may be [fol. 475] unloaded by consignee without charge over and above the transportation cost. With respect to the Chicago, Rock Island & Pacific Railway unloading pens are known as Burr Oak Yard and are located at Burr Oak Avenue and Ashland Avenue. A typical tariff of this company naming rates on livestock to Chicago, Illinois, is that company's ICC C-12637. The flat Chicago rate named in this tariff and other similar tariffs of the Rock Island apply to the shipments delivered to consignees at their Burr Oak Yard. The flat Chicago rates also apply to team tracks of this company located in Chicago, a typical team track being located at 43rd and Root Streets. So far as concerns the Atchison, Topeka & Santa Fe Railway, a typical tariff of this company naming rates on livestock to Chicago, Illinois, is its ICC 12423. The flat Chicago rates named in this tariff apply to the unloading facilities of the Atchison, Topeka & Santa Fe Railway at Corwith, Illinois, which specifically is located at 39th Street and Central Park Avenue. The flat Chicago, Illinois rates also apply to team tracks of this company in Chicago, one of which is located at 21st and Purple Street, and is known as the 22nd Street Yard, and a second facility of this character is located at

22nd and Lime Street, which is a joint track with the Illinois Central Railroad. C. & N. W. Ry. Tariff ICC 10650 is a typical tariff of this company naming rates on livestock to Chicago, Illinois, and the flat Chicago rates named in this tariff apply to team track facilities of the Chicago and North Western Railway, one of which is located at [fol. 476] 15th and Morgan Streets, Chicago, Illinois. Tariff ICC No. A-10848 is a typical tariff of the Illinois Central Railroad naming rates on livestock to Chicago, Illinois; the flat Chicago rate in this tariff in common with other carriers, applies to team track facilities of the Illinois Central Railroad in Chicago. One of these team tracks is indicated as located at Archer (22nd) and Halsted Streets, and is the facility operated jointly in connection with the Atchison, Topeka & Santa Fe Railway. As is the case generally, the Alton Railroad has several tariffs which name rates on livestock to Chicago, Illinois, dependent on origin and one of these tariffs is Alton Railroad ICC No. 56. The flat Chicago rates of the Alton Railroad named in these tariffs apply to its team track facilities in Chicago, typical instances being the team tracks indicated as located at 22nd Street and Halsted Street, and at 15th and Morgan Streets.

Mr. Blanchard: I shall have to ask that these tariffs that are being so freely quoted from be made available for cross examination. Even if the existing provision is there, which the witness refers to, there may be other provisions in the tariff which nullify these statements he is making, which can be brought out on cross examination.

Exam. Carter: Do you have the tariffs here?

Mr. Smith: I do not have them.

The Witness: I have.

[fol. 477] Exam. Carter: He has the tariffs here.

Mr. Blanchard: All right.

By Mr. Smith:

Q. Proceed, Mr. Sperry.

A. A typical tariff of the Minneapolis, St. Paul & Sault Ste. Marie Railroad is that company's ICC 6584, and the flat Chicago rates named in this tariff apply to the team track facilities of this company in Chicago, a typical facility of this character being located at Roosevelt Road and Canal Street. What I have said with respect to the application of the flat Chicago rates named in the Burlington tariff to

the facilities of the Union Stock Yard and Transit Company under the application of Chicago Switching Committee tariff ICC 365, R. A. Sperry, agent, applies with equal force to all other carriers so far mentioned, which is also true with respect to the application of the flat Chicago rates plus switching charge of the Chicago Junction Railway with respect to cars placed on the tracks of Swift and Company and the Hammond plant. Under the provisions of Chicago Switching Committee tariff ICC 365, referred to, flat Chicago rates of all of the carriers which I have so far mentioned apply to the cars placed on the industry tracks of the Omaha Packing Company.

Q. Mr. Sperry, I did not ask you to prepare yourself on this, and you may not have it in mind, but are you in a position to state the location of the several team tracks to which you have referred, with reference to the stock yards? Take this one at 60th Avenue and 31st Streets on the Burlington. Can you tell us approximately where that [fol. 478] is in the City of Chicago?

Exam. Carter: With relation to the location of the stock yards?

Mr. Smith: Yes; with relation to the location of the stock yards.

The Witness: That would be about six miles west and approximately three-quarters of a mile north of the location of the stock yards.

Mr. Smith: Thank you.

Mr. Blanchard: May I inquire if that is the point they call Clyde?

The Witness: 60th and 31st—I think that was the—just a minute.

Mr. Smith: 60th Avenue and 31st Street.

By Mr. Smith:

Q. That is the Clyde Stock Yards?

A. That is the Clyde Stock Yards.

Q. Yes. You referred to some Burlington team tracks that are in the vicinity of the Omaha Packing Plant. I think the Omaha Packing Plant is stated in the complaint to be approximately 2¼ miles, from the stock yards. How far is this team track of the Burlington from the Omaha plant?

A. The Omaha plant I believe is at 26th and Halsted;

Racine Avenue would be about six blocks west of Halsted and 16th would be ten blocks north of 26th. There may be some intervening streets designated as "places". There [fol. 479] may be 15th Place. I am not thoroughly familiar with that.

Q. Now, Mr. Sperry, you do not have a written statement with reference to the eastern lines' situation as I understand it.

A. No.

Q. Proceed to make such statement, and go slowly so Mr. Rynder and the Examiner can follow you—I guess you will have to go slowly anyway.

A. A typical tariff of the Baltimore & Ohio Railroad is in ICC WL10410. Flat Chicago rates provided in this tariff apply to team track facilities of the Baltimore & Ohio Railroad in Chicago. A typical tariff of the Chesapeake & Ohio Railway is that company's ICC 11656.

Mr. Blanchard: May I interrupt a moment—off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. Proceed Mr. Sperry.

The Witness: A typical tariff of the New York Central System is that company's ICC LS1605. The flat Chicago rates in this tariff apply, among other things, to team track facilities of the New York Central System in Chicago. A typical tariff of the New York, Chicago & St. Louis Railroad is that company's ICC 5421. The rates in this tariff also apply to team track facilities of the New York, Chicago & St. Louis Railroad. A typical tariff of the Pennsylvania Railroad is that company's ICC 1779. The flat Chicago rates named in this tariff apply to the team tracks [fol. 480] of the Pennsylvania Railroad in Chicago. I have indicated here there is one located at 47th and Stewart Avenue, one at Maplewood and 37th Street, and another one at 43rd Street and Western Avenue. A typical tariff of the Pere Marquette Railroad would be that company's ICC 5043. The flat Chicago rates named in this tariff apply to the team track facilities of the Pere Marquette Railroad, one of which is located at 13th and Lumber Streets.

By Mr. Smith:

Q. Mr. Sperry, are the eastern line tariffs and eastern line facilities that you have referred to, typical of those of the eastern lines generally?

A. They are.

Q. Some reference was made yesterday to this terminal charge of $2.70 per car on traffic arriving over the western lines. You are familiar with the tariffs carrying that charge, are you not?

A. I am.

Q. That was eliminated by order of the Interstate Commerce Commission?

A. To a great extent, yes.

Q. Well, it was eliminated on interstate traffic over the western lines, was it not?

A. That is correct, yes, sir.

Exam. Carter: There was one exception mentioned. There was some exception mentioned from Wisconsin points.

The Witness: Yes.

[fol. 481] Mr. Smith: Mr. Sperry understands that exception is eliminated. That is the reason I did not go into that.

By Mr. Smith:

Q. Did that charge apply to team tracks in Chicago, team track deliveries?

A. No, sir.

Q. On livestock.

A. No, sir.

Q. There is a terminal charge of $1.35 in effect on the eastern lines, is there not?

A. Yes, sir.

Q. That is a corresponding charge to the old $2.70 of the western lines, is it?

A. In its application, yes.

Q. Yes.

A. Yes.

Q. Does that apply to team track deliveries on livestock?

A. No, sir.

Q. Are the tariffs you have referred to already typical of those shown in that application on both eastern and western lines?

A. Yes.

Mr. Smith: I think that is all.

Exam. Carter: I want to ask you one question. I want to get this clear.

By Exam. Carter:

Q. This exception from Wisconsin no longer applies, then. In other words, the $2.70 charge has been eliminated [fol. 482] over all western lines, is that correct.

A. If I may say so, I believe that instead of being an exception, it was an erroneous statement.

By Mr. Smith:

Q. State what you understand the situation to be.

A. The plus charge does not now apply on interstate shipments from Wisconsin to Chicago.

By Exam. Carter:

Q. Or from any other western points to Chicago?

A. That is correct.

Mr. Smith: Mr. Sperry, I simply want to ask you this to make my point clear to the Examiner:

By Mr. Smith:

Q. When was that terminal charge cancelled on western lines?

A. I believe it was about a year ago.

Q. Up until a year ago, then, the receivers of livestock at the Union Stock Yards, including packers, with reference, now, to shipments moving in over western lines, were paying a premium of—what was it?

A. $2.70.

Q. — $2.70 a car to take delivery at the Union Stock Yards?

A. Yes.

Q. Which would not have been in effect if they had taken delivery on the team tracks?

A. That is correct.

[fol. 483] Q. And on traffic moving over eastern lines they are still paying a premium of $1.35 per car?

A. That is correct.

Mr. Smith: That is simply an attempt to throw some light on what the destination "to Chicago", meant. I think that is all.

Exam. Carter: Are there any questions?
Mr. Rynder: Yes.

Cross-examination.

By Mr. Rynder:

Q. Do you know of any reason why they paid and are paying that premium for the most part?
A. I do not definitely know the origin of the so-called plus charge of $2.70.

Mr. Rynder: That is not what I asked you.
Mr. Smith: That is not what he asked.

By Mr. Rynder:

Q. Assume that the plus charge was in and is in and that a shipper sends a car of livestock to the Union Stock Yards. Have you any idea why he pays that premium to get there?
A. Because he prefers delivery at the stock yards.
Q. Is it not a fact that is the only place in Chicago where there are commission men who will sell his livestock?
A. I presume that is the situation. I do not have any definite knowledge.
Q. At any place other than these you have mentioned [fol. 484] are there located commission men's pens, alleys, sales pens and so forth, at which livestock could be sold by commission men to a purchaser or slaughterer?
A. Not to my knowledge.
Q. Not to your knowledge?
A. No.
Q. So it would seem to be a reasonable conclusion, would it not, that if a shipper of livestock wants to sell them in Chicago, he has to send them to the stock yards?
A. I should say so, yes.
Q. The only specific station you mentioned on the Burlington was Clyde. What facilities exist there for handling livestock? How many pens are there?
A. I have a memorandum here.
Q. Have you examined it?
A. 15 pens, each holding one car.
Q. What is the location of that with respect to the stock yards?

Mr. Smith: He stated that.

The Witness: 60th Street, I believe, and Central Avenue.

By Mr. Rynder:

Q. Is that within the city limits of Chicago?

A. I am not sure.

Q. Is that not out in our friend Al Capone's former domain, in Cicero?

A. I am inclined to think it is.

Mr. Smith: What friend was that you spoke of? Read [fol. 485] that question please, Mr. Reporter.

(Question read.)

By Mr. Rynder:

Q. Speaking generally, because I do not want to ask about the team track deliveries one by one, have you examined some of them?

A. I have.

Mr. Smith: If you are interested, Mr. Rynder, the next witness is going to give you some statistics on those deliveries you are inquiring about.

Mr. Rynder: I do not know what the next witness is going to testify to. I want to ask Mr. Sperry, because he is on the stand.

By Mr. Rynder:

Q. Can you state very briefly what ones you have examined?

A. The Alton Railroad at 22nd and Halsted and 15th and Morgan. The Santa Fe at 21st and Purple.

Q. Let me ask first—maybe we can shorten this—are there any of them that have any chutes or runways for taking livestock out of the cars?

A. Not of those that I have examined.

Q. None having those facilities?

A. No.

Q. Did you look at them while a carload of livestock was being unloaded?

A. No, sir.

[fol. 486] Q. You do not know how it takes place?

A. Well, I know how I would do it.

Q. You have not seen them?

A. No; I have not seen the operation.

Q. You did not see any facilities there in the way of chute pens or any other facilities for getting livestock from the car to the ground, did you?

A. No.

Q. That is true of all you examined?

A. That is right.

Mr. Smith: You are talking about team tracks there, as I understand it.

Mr. Rynder: Yes.

The Witness: Yes.

By Mr. Rynder:

Q. Mr. Sperry, if a car came in not billed to the Union Stock Yards, why would you send it to that point if you knew it was going to incur extra charges to the shipper and that he had protested against it?

Mr. Smith: That is objected to as calling for a conclusion, and immaterial.

Exam. Carter: You do not have anything to do with the sending of those cars, do you?

The Witness: No.

By Mr. Rynder:

Q. You have nothing to do with that?

A. No, sir.

[fol. 487] Q. Now, getting back to Clyde, Illinois, which you referred to as being in Cicero, Cicero is beyond the city limits of Chicago, is it not?

A. I think it is a separate municipality.

Q. Yes.

A. Separate from Chicago.

Q. So if a car had been billed to Swift and Company, Chicago, Illinois, a delivery in Cicero, Illinois, would not have complied with the terms of the contract, would it?

A. It might, because——

Q. Wait a minute.

A. Well, that would be governed——

Mr. Smith: He wants to ask, but he does not want you to answer.

The Witness: That would be governed by the tariff.

Mr. Rynder: Wait a minute. Let us be reasonable.

By Mr. Rynder:

Q. If I order a car delivered to me in Chicago, do you mean to say that you carry out your contract by delivering it in a different municipality?

A. There again, that is one phase of the railroad business I am not——

Exam. Carter: That is asking the witness for a construction of the contract. You may give whatever explanation you want in answer to that question. I do not think he ought to construe the contract. He may state that certain tariffs——

[fol. 488] Mr. Rynder: I will withdraw the question, upon the admission by the witness that the point is not within the municipal limits of the City of Chicago.

By Mr. Smith:

Q. By the way, is that in the Chicago switching district, Mr. Sperry?

A. It is.

By Mr. Rynder:

Q. Does the Chicago switching district extend to a substantial distance beyond the municipal limits of Chicago?

A. It does, yes; a greater distance in some directions than in others.

Q. But substantial portions of the switching district of Chicago, as defined by the carriers, are beyond the municipal limits of the city of Chicago?

A. That is correct, yes.

Mr. Rynder: That is all.

Exam. Carter: Does that complete your cross-examination?

Mr. Rynder: Yes.

Mr. Smith: That is all.

Exam. Carter: Mr. Blanchard, have you any questions?

Mr. Blanchard: Yes.

By Mr. Blanchard:

Q. Did I understand you to say, Mr. Sperry, that the Milwaukee rate to Chicago was applicable to some team track?

A. Yes, sir.

Q. I hand you the Milwaukee tariff and ask you to give [fol. 489] specific reference—just a moment. I hand you the Milwaukee tariff I. C. C. No. B6612 and ask you to show me where that is.

[fol. 490] A. This tariff naming as it does rates from various points to Chicago, Illinois, those rates with respect to traffic brought into Chicago by the Milwaukee Railroad apply to all of the facilities of the Milwaukee Railroad in Chicago, there being no statement in the tariff to the effect that the rates do not apply to team tracks.

Q. Is there a statement in the tariff that the rates apply to any specific point or points in Chicago?

A. No. There is not. Therefore they apply to all points on the Milwaukee railroad.

Q. Read the column heading on the first column on the left of page 28; where does it show rates apply to? Read it all.

A. That column covers "Chicago, Illinois (Galewood Stock Yards) (Bensenville Yard)".

Q. Does not that same language appear wherever "Chicago" appears on all of the succeeding pages up to and including page 94 of the tariff?

A. Yes. That expression does appear on those pages.

Q. Now, is there any language in the tariff that authorizes you to apply that rate named in that tariff to any point in Chicago other than Bensenville yard and Galewood yard?

A. I will have to examine it further.

Q. That is what I asked you in the first place.

Mr. Rynder: That is the livestock rate.

The Witness: Yes.

[fol. 491] By Mr. Blanchard:

Q. This is a livestock tariff I gave you, is it not, and contains only livestock rates?

A. That is right.

Mr. Smith: To save time, we will look into that and make a full report. In some instances livestock is picked up on team tracks. We will show what the situation is.

Mr. Blanchard: You mean, at the Chicago rate, Mr. Smith?

Mr. Smith: That is our understanding.

The Witness: I have had several tariffs——

Mr. Rynder: We understand, generally speaking, from our knowledge of the tariffs, that Mr. Sperry was wrong in every one of these statements.

Mr. Blanchard: Except with reference to the Northwestern tariff.

Mr. Rynder: Except as to one railroad. I think we have the right to bring out the fact that Mr. Sperry has done a hurried piece of work.

By Mr. Blanchard:

Q. Mr. Sperry, you testified, did you not, that the Rock Island rate was applicable to the Rock Island team tracks somewhere down near the loop, did you not?

A. Yes.

Q. I hand you a Rock Island tariff you just gave me, C-12637, and ask you to name all the destinations in the Chicago switching district that the tariff names?

A. Chicago, Englewood, South Chicago, Washington [fol. 492] Heights, Burr Oak and Blue Island.

Q. And the rate applicable to those points is the Chicago rate, is it not?

A. For Chicago points, yes.

Q. Burr Oak and Blue Island are not in Chicago, but in the city of Blue Island, are they not?

A. Yes.

Q. Washington Heights is a point on your line in Chicago, is it not?

A. I believe Washington Heights is.

Q. So is South Chicago on your line over through Bernard?

A. Yes.

Q. So is Englewood, near 59th Street?

A. Yes.

Q. Are there any other points named in the tariff to which that rate applies on your line?

A. I think I will examine this one.

Mr. Smith: Let me make this suggestion, that these gentlemen examine these tariffs; let Mr. Rynder and his associates examine the tariffs during the noon hour, and we will look into the matter further during the noon hour and bring the matter to a conclusion after lunch.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. I may state on the [fol. 493] record at this time that the tariff men for both sides are going to examine these tariffs, and we will continue with the cross-examination of Mr. Sperry with respect to those tariffs, and his testimony with respect thereto later on. Is there any further cross-examination of Mr. Sperry at this time?

Mr. Rynder: Not by me.

Exam. Carter: Then as I understand it, except for that relating to the tariffs, there is no cross-examination of Mr. Sperry; that is, other than that which will relate to these tariffs.

Mr. Blanchard: I have none.

Exam. Carter: You are excused for the time being, Mr. Sperry.

(Witness withdrawn.)

Exam. Carter: You may call your next witness.

Mr. Smith: I will call Mr. Hoffmann.

F. F. HOFFMANN was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. State your full name for the record, please, Mr. Hoffmann.

A. F. F. Hoffmann.

Q. What is your business, Mr. Hoffmann?

A. Livestock agent of the Western Weighing & Inspection Bureau at the U. S. Yards, Chicago, Illinois.

[fol. 494] Q. Just in a general way what are your duties in that capacity?

A. Well, I supervise the inspection of livestock and the policing of hoof weights.

Q. Where abouts?

A. I beg your pardon?

Q. Where is the site of your activities?

A. Union Stock Yards, Chicago, Omaha Packing Company.

Q. What is the Western Weighing & Inspection Bureau?

A. The Western Weighing & Inspection Bureau?

Q. Yes.

A. Ask the question again.

Mr. Smith: Read the question.

(Question read.)

A. Why, it is a bureau operated under the supervision of the Western Trunk Lines.

Q. For what purpose is it maintained?

A. At U. S. Yards we inspect livestock and police hoof weights.

Q. How long have you been with the Western Weighing & Inspection Bureau?

A. Almost 20 years; 19 years and a few months.

Q. In what capacity?

A. I first started as a livestock inspector, patrol-ing alleys, and platforms on the stock yards. My position was then changed to hoof weight clerk—or rather, I took the position of hoof weight clerk. Then I became chief clerk for the Agent and in September, 1929, I was appointed live-

[fol. 495] stock agent.

Q. Have your duties required you to be in and around the U. S. Yards?

A. On loading platforms?

Q. Generally speaking.

A. I am in and out every day of my life.

Q. For a good many years have you been engaged in your duties with the Western Weighing & Inspection Bureau at the Union Stock Yards in Chicago?

A. 19 years.

Q. 19 years?

A. And a few months.

Q. During all of that period have you been in and about the yards pursuing your duties?

A. I have.

Q. With the Western Weighing & Inspection Bureau?

A. Yes.

Q. At my request did you make some survey of the street and traffic conditions, particularly on 39th Street north of the yards, and on Ashland Avenue west of the yards?

A. I did.

Q. Referring first to 39th Street, is that a paved street?

A. It is.

Q. Can you give us some understanding as to the traffic conditions on that street?

[fol. 496] A. Traffic conditions on Pershing Road, formerly 39th Street, are quite heavy at Ashland Avenue and Pershing Road. Pershing Road is 62 feet wide. It is a new pavement and traffic speeds along there at quite a rapid pace.

Q. Did you make any survey of the amount of traffic on 39th Street?

A. 39th and what other point, Mr. Smith?

Q. I say, at some other point?

A. 39th and Ashland, I did.

Q. What did you find out about the traffic condition there?

A. There are stop lights, traffic signals, at 39th and Ashland Avenue, which were set at 7 o'clock A. M., at every 25 seconds. That is, they would change from red to green every 25 seconds. We counted approximately 950 trucks and passenger cars crossing Pershing Road at Ashland, or 39th at Ashland.

Q. Are there any street cars on Ashland Avenue?

A. Street cars run north and south on Ashland Avenue.

Q. Two tracks?

A. Two tracks.

Q. There are no street cars on 39th Street, are there?

A. West of Ashland there are.

Q. But not at the point we are discussing here?

A. They terminate at Ashland.

Q. Then are any further stop lights encountered between the corner of Ashland and 39th and 42nd Street?

[fol. 497] A. There are.

Q. Where are they?

A. Going south under the Chicago Junction viaduct you come to a stop and go sign at 41st and Ashland Avenue. I might say there that 41st Street at Ashland is a dead end street. You cannot proceed west of Ashland Avenue due to the Wilson & Company packing plant being located at that particular point. After passing those traffic lights you come to a street on the west side of the street that enters Wilson & Company's general office. At this particular point the traffic signals were set, at that early morning hour, at 25 seconds. Of course, on these traffic lights there is a sign "Set at 20 miles per hour." These traffic signals can be regulated for any speed. After passing this signal we came to 42nd and Ashland, where the traffic signals are set at the same speed.

Q. Are these red and green stop and go lights?

A. Right.

Q. Is 42nd Street a street over which some traffic, live-stock traffic is moved by the packers?

A. It is. Incidentally, I might say that 42nd Street is also a dead end street similar to 41st Street. In other words, you cannot go direct over Ashland Avenue.

Q. You cannot proceed on west?

A. You cannot proceed on west.

Q. There is a Swift plant on that corner?

[fol. 498] Mr. Rynder: Did I get that clear? I understood him to say you could not go from 42nd Street on to Ashland Avenue.

The Witness: No.

Mr. Smith: He says you could not proceed on west.

Mr. Rynder: I think what he means is you could go on to Ashland Avenue, but the——

The Witness: The west side of Ashland is dead end.

Mr. Rynder: Not the east side.

The Witness: Not the east side. You can make a left hand turn going south into 42nd from Ashland Avenue.

By Mr. Smith:

Q. 42nd Street as it proceeds east from Ashland is a private street, is it?

Mr. Rynder: Do you know?

The Witness: I am not qualified to answer that question, Mr. Smith.

By Mr. Smith:

Q. Is there any bottle neck or narrowing of Ashland Avenue at the point where it goes under the viaduct you have spoken of?

A. Yes, sir, there is.

Q. That is, between the intersection of Ashland and 39th Street, and 42nd Street?

A. It is approximately 40 feet north of 41st Street.

Q. What is the traffic condition at that point?

A. Why, the traffic that goes south or north under this viaduct—there is congestion at this particular point. The [fol. 499] traffic going south makes a left hand turn on 41st Street, on either the green or the red light. It is permis-

sible, according to the traffic officers standing there at that particular time. I have done it myself, because I enter the stock yards at that point from my home.

Q. Swift and Company is now trucking most of its directs over part of the streets that you have been describing, is it not?

A. From the Omaha Packing Company plant.

Q. Yes.

A. Yes.

Q. Does some of that go down Ashland Avenue to 42nd Street, or does it all go through Transit Avenue, so-called, from 39th Street?

A. I have followed trucks down Pershing Road, to Ashland; Ashland to 42nd; east on 42nd to the unloading chutes.

Q. I think there was some reference yesterday to some of that traffic being handled through 39th Street and down so-called Transit Avenue leading south.

A. That is correct, Mr. Smith.

Mr. Reneker: I did not say that.

Mr. Smith: Perhaps I am mistaken about that.

Mr. Reneker: Yes.

Mr. Smith: You do not handle it that way?

Mr. Reneker: No.

By Mr. Smith:

Q. At my request did you make an examination last even- [fol. 500] ing to see whether so-called Transit Avenue running south from 39th Street is open or closed at night?

A. I did.

Q. What situation did you encounter there?

A. There are no gates located on Transit Avenue between Pershing Road and Packers Avenue either on the north or south side of the Chicago Junction switch tracks, but at 7 o'clock there is a portable wooden horse placed across Transit Avenue near the Chicago Junction switch tracks to prevent traffic from entering the stock yards or entering from Transit Avenue into Packers Avenue.

Q. Are there any watchmen there?

Mr. Rynder: Which side of the tracks is that?

By Mr. Smith:

Q. On which side of the tracks, Mr. Hoffmann, north or south?

A. This portable horse is placed on the north side of the Chicago Junction tracks at the entrance, at 39th Street.

Q. Are there any watchmen located there?

A. Oh, yes.

Q. You prepared a number of exhibits for submission here, Mr. Hoffmann, did you not?

A. Yes, sir, I did, at your request, and under the instructions of our general office.

Mr. Smith: I will now ask to have this document identified as the next exhibit.

[fol. 501] (Defendants' Exhibit No. 21 marked for identification.)

By Mr. Smith:

Q. I hand you an exhibit identified as Defendants' Exhibit 21, bearing the caption "Statement of Team Track Deliveries of Livestock via Western Lines, Showing the Number of Cars By Months for Years 1935, 1936 and 1937."

A. Yes.

Q. I will ask you if that statement was prepared under your direction.

A. It was.

Exam. Carter: Is that team track deliveries in Chicago?

By Mr. Smith:

Q. Are the team tracks that are referred to on this statement all located in the city of Chicago?

A. They are.

Q. You know that they are?

A. I do.

Q. You know where they are, do you?

A. I do.

Q. Referring to the numbers that appear under the caption "1935" for example, are those the number of cars that were delivered during the respective months shown on these team tracks?

A. They are.

Q. That is typical of the way the exhibit is gotten up, is it?

A. It is.

Q. So that, for the three years, there has been a total of 2,331 cars delivered on these team tracks?

[fol. 502] A. That is right.

Q. Do you know whether those cars were consigned to and unloaded by packers in the city of Chicago?

A. Yes, I do.

Q. Were they?

A. They were delivered and unloaded by packers, small packers in Chicago.

Mr. Smith: We offer in evidence exhibit 21, if the Examiner please.

Mr. Rynder: Mr. Examiner, I will have to object to the exhibit in its present form. If I am correctly informed, there are certain of these railroads, and some of them at far distant points, that provide for team track delivery and others who do not. I think this exhibit is not admissible unless it shows on what team tracks the deliveries were made, so we can check up and find out whether that was a lawful delivery.

Exam. Carter: Is he able to get that information?

Mr. Smith: Mr. Examiner, I think Mr. Rynder is getting a little bit mixed up here. As I understand it, we have a tariff question before the Examiner that is pending. There is going to be an examination of the tariffs. That matter is going to be brought to a conclusion this afternoon. That apparently will take care of Mr. Rynder's trouble.

Mr. Rynder: No, it will not, because I want to know whether this delivery was made on a team track where it [fol. 503] was permissible, or where it was not.

Mr. Smith: Do you think some of these deliveries were improperly made?

Mr. Rynder: Well, evidently on the first tariff that was brought up—I do not know what was on the Milwaukee. If we are correct in our construction, any team track delivery——

Exam. Carter: You have the data on which you based this study, have you not, Mr. Hoffmann?

Mr. Rynder: I am assuming for the moment that we are correct about the Milwaukee tariff.

Exam. Carter: Do you have the data upon which you based this study, Mr. Hoffmann?

The Witness: Not with me today.

Mr. Rynder: If any of these deliveries were on the Milwaukee at any other than the two stations specified, they are not permissible.

Mr. Smith: I think I can cut this short. We will show anything anybody wants. There is a lot of information which we are going to put in here, that because of the provisions of the Act, we are not going to show in detail, such as who the recipients of this traffic are, or any of that detail. With reference to any of this detail which Mr. Rynder wants to get, if the Examiner will tell us to furnish it and thereby relieve us of any of the provisions of the Act, we will be very glad to do it. All you need to do is tell me what you [fol. 504] want. It will be forthcoming.

Mr. Rynder: I just simply want the team track and the railroad. I believe that avoids any conflict with any provisions in the law.

Mr. Smith: All right. We will furnish that. You want to know upon what team tracks those cars were unloaded in order that you can ascertain whether or not they were unlawful deliveries?

Mr. Rynder: Yes.

Mr. Smith: All right.

Mr. Rynder: When I say "team track" I assume that includes the name of the railroad.

Mr. Smith: Yes.

Exam. Carter: The team track will be the team track on the particular railroad? In other words, you want the name of the railroad?

Mr. Rynder: Yes. We will have to have that.

Exam. Carter: In other words, if it is on the Milwaukee team track, we will assume that that is the name of the railroad, unless otherwise stated.

Mr. Smith: Yes.

Mr. Rynder: That is all right; and the location of the team track.

Exam. Carter: Yes.

Mr. Smith: Yes. I think it would be well to have the location.

[fol. 505] Exam. Carter: Very well. Proceed.

Mr. Smith: I will now ask to have this next document identified as exhibit 22.

(Defendants' Exhibit No. 22 marked for identification.)

By Mr. Smith:

Q. I hand you what has been identified as Defendants' Exhibit No. 22, Mr. Hoffmann, which bears the caption "Statement of Cars of Livestock Received at Union Stock Yards and the Omaha Packing Company Consigned Respectively to Swift and Company and the Omaha Packing Company Over the Western Lines."

A. Yes.

Q. I will ask you if that was prepared at your direction.

A. It was.

Q. Are the figures shown under the several headings of years intended to represent the number of carloads?

A. That is right.

Q. Are the facts and figures shown on this exhibit 22 true and correct to the best of your knowledge and belief?

A. They are.

Mr. Smith: I now offer Defendants' Exhibit No. 22 in evidence, Mr. Examiner.

Mr. Rynder: I might just observe that counsel is very careful to refrain from disclosing information as to certain other shippers in this city, but not as to us.

Mr. Smith: You happen to be the complainants here. That [fol. 506] makes some difference, Mr. Rynder.

Exam. Carter: Exhibits 21 and 22 will be received in evidence.

Mr. Rynder: I am not objecting to exhibit 22.

(Defendants' Exhibits Nos. 21 and 22, Witness Hoffmann, received in evidence.)

Mr. Smith: I will now ask that this next document be identified as Defendants' Exhibit 23.

(Defendants' Exhibit No. 23 marked for identification.)

By Mr. Smith:

Q. I now hand you, Mr. Hoffmann, what has been identified as exhibit No. 23, which bears the caption "Statement of Cars of Livestock Received at Union Stock Yards Over Western Lines, Consigned to Swift and Company Showing Separately Those Taken by Swift and Company at Unloading Chutes and Those Taken By Swift and Company From Holding Pens."

A. Yes.

Q. I will ask you if that exhibit was prepared at your direction.

A. It was.

Q. Are the figures shown thereon, Mr. Hoffmann——

Mr. Rynder: Just a moment. Are those figures within your possession?

The Witness: I have access to those figures.

Mr. Rynder: The only people who could make such a record is the stock yards company, as to cars being unloaded.

The Witness: Yes, sir.

[fol. 507] Mr. Rynder: I object.

Mr. Smith: If you do, I will develop that a little bit. Just before I do that, Mr. Rynder, I had some talk with you about this matter of figures and what you wanted me to do about it, as you will recall. We are going to offer some figures including this exhibit, which show material taken from reports made by the stock yards people to the joint officers of the railroads. Later I am going to offer exhibits that were prepared in part from an inspection of the records of the Union Stock Yard and Transit Company, which we were given an opportunity to make. If you are going to want to see those records, or if you are going to want the Union Stock Yard and Transit man here, I wish you would tell me now, so we can make that arrangement.

Mr. Rynder: Give me just a moment to look this over.

Mr. Smith: All right.

Exam. Carter: We will recess for a few minutes.

(Short recess.)

Exam. Carter: Did you have a statement you wanted to make?

Mr. Rynder: Did you ask me that?

Exam. Carter: Did you have a statement you want to make for the record, Mr. Rynder?

Mr. Rynder: I thought the reporter took it down.

Exam. Carter: No. We were off the record.

Mr. Rynder: I said, after conference with Mr. Smith, upon his statement to me that the information I would de-

[fol. 508] sire to elicit from this witness on cross-examination, on exhibit 23 would be furnished later in other exhibits, I will now withhold any objection to exhibit 23, but I may renew it or move to strike the exhibit later if the information I desire is not furnished.

Exam. Carter: I might state at this time, to clarify

matters, that if this exhibit is objectionable to you because of its form, and because of its being presented by this witness, I will, if necessary, issue a subpoena for the proper stock yards company officials to come here and furnish this information.

Mr. Rynder: I do not want to cause that trouble or delay if I can avoid it, and perhaps it will work out satisfactorily.

Exam. Carter: Very well. Proceed.

By Mr. Smith:

Q. Referring now to the information shown under the heading "At Unloading Chutes"—do you have that, Mr. Hoffmann?

A. Yes.

Q. I call your attention to the 196 cars which are shown here under the heading "At Unloading Chutes".

A. Yes.

Q. I will ask you whether or not that means that those 196 cars were taken possession of by the consignee, Swift and Company, at the unloading chutes.

A. That is correct.

Q. And were the animals in those cars driven over to the [fol. 509] Swift plant through the yards by the employees of Swift and Company?

A. Evidently, yes.

Mr. Rynder: I move now to strike that testimony as not being within the knowledge of the witness.

The Witness: I am not qualified to say that I have followed that 196 cars to Swift and Company's plant.

Mr. Smith: I am disappointed, Mr. Hoffmann. I thought you did.

By Mr. Smith:

Q. Do you know generally, Mr. Hoffmann, what cars——

Mr. Rynder: Just a moment. I have a motion pending before the Examiner.

Exam. Carter: It is apparent, Mr. Hoffmann, that the answers to those two questions, the previous two questions, were not based upon your own knowledge. Let me ask you this:

By Exam. Carter:

Q. As to these 196 cars, do you know of your own knowledge or from records that you have examined, whether or

not those 196 cars were taken possession of by the consignee at the unloading chutes?

A. From the records I have examined, from which I made my survey, yes.

Q. Do you know of your own knowledge whether or not the contents of those 196 cars were driven from the unloading chutes by the employees of the consignee?

A. I do not know.

[fol. 510] Q. You do not know that?

A. No.

Exam. Carter: I will strike his answer as to that question, his previous answer to that question.

By Mr. Smith:

Q. Do you know how livestock, consigned to the packers, including Swift and Company, of which possession is taken by the packers at the unloading chutes, is handled and by whom it is handled?

A. The packers have their——

Mr. Rynder: He is not answering the first question.

The Witness: What was the question?

Exam. Carter: Read the question.

(Question read.)

Mr. Rynder: He has not answered the only question Mr. Smith asked him.

Mr. Smith: Perhaps you have a question you want to ask him, Mr. Rynder.

Mr. Rynder: No. Mr. Smith's question was whether he knows. He did not answer that question.

The Witness: Yes. I do know.

By Mr. Smith:

Q. How are they handled?

Mr. Rynder: Wait a minute.

By Mr. Rynder:

Q. What is the source of that information?

A. My experience as a livestock inspector on the platforms and in the alleys of the Union Stock Yards, during [fol. 511] my period of being a livestock inspector and livestock agent. My duties take me down there into the unload-

ing platforms and those alleys and I do see the packers' representatives taking the livestock from the unloading chutes to the alleys where they are driven by the employees of the packers to various arteries leading to the plants of the various packers.

By Mr. Smith:

Q. Yesterday Mr. Reneker testified that except for cripples all livestock taken possession of by Swift and Company at the unloading chutes is driven by the packers' employees through the yards to their plant. Does that conform to your knowledge of the situation?

A. Those that are taken at the unloading chutes by the employees of the packers are driven to the packing plants by the employees of the packers.

Q. And the point you made a few moments ago was that you had not followed these 196 cars to make sure that was so with reference to those; is that what you are attempting to say?

A. That is right.

Q. With reference, now, to cars which are placed in holding pens, as you define them here under the year 1935, who placed those animals in the holding pens?

A. Employees of the stock yards company.

Q. Here again you did not follow these 215 cars, did you?

A. No, sir.

Q. Who takes the livestock so placed in the holding pens [fol. 512] consigned to the packers from the holding pens for driving to the consignee, Swift and Company?

A. Employees of the packers. Representatives of the packers.

Q. Is that the rule without any exceptions, except with reference to the crippled animals we have been talking about?

A. Yes, sir.

Q. Does what you have said apply to this exhibit generally and to the various years and months shown there?

A. It does.

Q. With reference to sheep, the holding pens are covered, are they not?

A. They are.

Q. They are located at various places in the yards?

A. North and south of Exchange Avenue.

Q. I will not go into that. I understand we are going to have that covered by other witnesses.

A. I see.

Q. Where are these other holding pens located?

A. They are located throughout the yards.

Q. Approximately how many of them are there?

A. I would not even venture a guess.

Q. Will you say there are a dozen or ten thousand?

A. There are one hundred.

Q. I beg your pardon?

A. There are more than one hundred.

[fol. 513] Exam. Carter: More than one hundred what?

The Witness: Holding pens.

Exam. Carter: I see.

The Witness: A sales pen can be termed a holding pen.

By Mr. Smith:

Q. Well, are sales pens included within the meaning of the term "holding pens"?

A. No.

Q. As you have it on the exhibit?

A. They are not.

Q. What is the meaning of "holding pens" as you have used that term on this exhibit?

A. Pens in which the animals are held subject to being called for by a representative of the consignee.

Mr. Smith: Mr. Examiner, in order to have some official showing here of the routes over which these animals are driven to the plants of the packers, I ask the witness to take exhibit No. 1, using a red pencil, and indicate not with utter precision, but with as much accuracy as possible, over what routes these shipments are handled. Now, Mr. Rynder, I am going to have the witness testify about this and identify it. I suggest that we call this exhibit 1-A and put it in the record in that way. Is that satisfactory?

Mr. Rynder: Just a moment. Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

[fol. 514] Exam. Carter: Back on the record. You may have that exhibit identified as exhibit 24, Mr. Smith.

(Defendants' Exhibit No. 24 marked for identification.)

Exam. Carter: Proceed.

By Mr. Smith:

Q. At my request did you trace in red on exhibit 1 some, if not all, of the routes which may and are customarily taken in the driving of livestock consigned directly to the packers at the Union Stock Yards——

A. I have——

Q. Just a minute, please.

A. Pardon me.

Q. —in moving the animals from the unloading chutes to the plants of the packers?

A. I have.

Q. I call your attention to Defendants' Exhibit No. 24 for identification.

A. Yes.

Q. I will ask you whether such routes have been traced on the exhibit.

A. They have.

Q. Have you also marked or indicated on the map where the Swift hog-killing plant is?

A. I have, with an arrow.

Q. The Swift Hog-killing plant itself is not shown on this map, is it?——

[fol. 515] A. Well, there are two houses there. There is one at Racine.

Q. Just west of Racine?

A. Just west of Racine.

Q. That is within the area of the map, is it not?

A. It is.

Q. Then there is one located west of that?

A. On Packers Avenue.

Q. That is not within the area of the map?

A. That is correct.

Q. But you have indicated that by an arrow?

A. Yes.

Q. What is the place south of that that you have indicated in writing on the map in red?

A. That is an overhead drive to Armour & Company's hog house.

Q. What are these solid red lines that are shown on this map?

A. Possible routes that may be taken to the various packing plants.

Q. Are they on the ground, or are they over the ground on viaducts, or driveways?

A. Those are overhead.

Exam. Carter: ~~Describe~~ that.

By Mr. Smith:

Q. Mr. Hoffmann, are there any of the solid red lines that run overhead?

A. This is on the second floor of the sheep house, this line (indicating).

[fol. 516] Exam. Carter: Identify it. That does not mean anything in the record.

Mr. Smith: Mr. Hoffmann, please when you refer to these lines identify them with reference to something on the map.

By Mr. Smith:

Q. Are you now going to refer to the solid line running east and west?

A. East and west on platform No. 9.

Q. Parallel to it?

A. Parallel to platform No. 9.

Q. What do you want to say about that?

A. These red lines (indicating)——

Q. No. Just a minute, please. You referred to a line running parallel with an unloading dock shown on map as No. 7 alley. What do you want to say about that line with reference to whether it represents an overhead passageway, or a passageway on the ground?

A. You can use both, Mr. Smith, on the level with the ground, or through the sheep house.

Q. There is an overhead passageway and an underneath passageway?

A. They have inclines. You can go to the second floor and you can drive them through the sheep house to these various arteries which will lead them directly to their plant.

Q. I call your attention to the solid red lines proceeding south from that point, running north and south.

A. Yes.

[fol. 517] Q. Are those overhead or ground passageways?

A. They are overhead passageways.

Q. And they connect with the overhead passageway depicted by the solid red line running parallel to platform No. 7 that you described?

A. That is correct. Where I said "platform 9", I meant "platform 7".

Q. Now, with reference to the solid line running east and west and proceeding westerly from the red line, that is, the most westerly of the three you have referred to—the line to which I am calling your attention running into the Swift hog-killing plant—is that an overhead passageway?

A. Yes, sir.

Q. And the line running parallel thereto, the line running south of that line running into the Armour plant, is that an overhead passageway?

A. It is.

Q. Now, I call your attention to the places on the map where you have drawn two short parallel red lines as distinguished from the solid lines which we have been discussing.

A. Yes.

Q. What is the purpose of drawing those lines? Are they overhead passageways between certain runways?

A. They are. They are overhead.

Q. Take, for example, some animals taken possession of [fol. 518] at one of the most distant points from the Swift plant on No. 2 block of unloading chutes.

A. Yes.

Q. Will you trace how a typical shipment is and has been handled by the employees of the packing company—I am referring to Swift—from the unloading chutes I have designated to the Swift plant, to the extent you can, indicating the route so that it will be shown clearly in the record.

A. You can drive them down the alleys designated as No. 2 direct to the nearest incline crossing Laurel Street, or they may be driven——

Q. Let us take one shipment, now.

A. Yes.

Q. If you try to take more, you will get it confused. Take a typical route followed by employees of Swift driving animals from that point.

A. Well, it depends upon congestion in the yards, Mr. Smith.

Q. All right.

A. You can drive them down the alleys adjacent to the unloading platforms to the nearest or convenient incline that leads to this particular dock. It may be on the ground part of the way and it may be overhead.

Q. Is it possible to give the Examiner any idea as to how a typical shipment of livestock could be driven across the stockyards property?

[fol. 519] Exam. Carter: Let me ask him one question right there:

By Exam. Carter:

Q. Is this correct or is it not: If there is congestion in the yards it would probably be driven not necessarily over the nearest route, and if there is not congestion in the yards it might be driven over the nearest route, is that right? I am just asking if that is correct. It may not be correct at all. I do not know.

A. Where there is congestion, Mr. Examiner——

Mr. Rynder: Mr. Examiner, to shorten this thing I will agree on behalf of complainant it might be driven over any route——

Mr. Smith: Why not let the witness answer the Examiner's question?

Mr. Rynder: He was taking a long time to answer. I think I could meet your requirement that way.

Mr. Smith: If he does not know, I simply suggest that he say he does not know. If he can answer the question, I suggest that he answer the question.

Exam. Carter: Read the question to the witness, Mr. Reporter.

(Question read.)

Mr. Rynder: Then I think he started to make an answer there.

Exam. Carter: He did not answer the question.

Mr. Smith: Will you say whether you know? Answer the [fol. 520] question.

Exam. Carter: Read the question again.

(Question again read.)

Mr. Rynder: I would like Mr. Smith to think over one other thing during lunch. I am perfectly willing to agree

that any of our shipments may have been driven over the routes indicated by red, or they may have been driven over any other routes available through the stock yards.

Exam. Carter: We will recess until 2 o'clock.

Mr. Smith: Well, can we not have an answer to your question first?

Exam. Carter: Surely.

Mr. Smith: At least I would like the witness to say he does not have an answer to it, or give an answer to it if he has one.

The Witness: I cannot answer that question.

By Exam. Carter:

Q. Is this true, that there is no route that is followed more than any other? In other words, is it true that there may be several routes, and depending upon the conditions in the yards or the whim of the persons who are driving the stock, any one of those routes might be taken from time to time?

A. That is correct, Mr. Examiner.

Q. Does that reflect about the situation?

A. That reflects about the situation.

[fol. 521] Exam. Carter: We will recess until 2 o'clock.

(Whereupon, at 11:20 A. M. Central Standard Time, adjourned until 1 o'clock P. M., Central Standard Time.)

Afternoon Session, 1 P. M. C. S. T.

Exam. Carter: Come to order, gentlemen. You may continue with your examination of the witness, Mr. Smith.

F. F. Hoffmann, having been previously sworn, resumed the stand and testified further as follows:

Direct examination (Continued).

By Mr. Smith:

Q. Mr. Hoffmann, is it a fact or not that animals driven from the chute pens or the holding pens to the packers plants follow various routes?

A. They do.

Q. Taking the hogs driven to the Swift plant, for example, whatever route they initially take, do they all finally take one route in going into the plant?

A. In the case of hogs, yes; hogs and sheep.

Q. Where do the hogs and sheep strike this part of the route which is the same for all?

A. At Racine Avenue, just south of Exchange Avenue.

Q. Well, would that be at the point where this solid red line crosses Exchange Avenue?

A. It would lead into that driveway, the overhead driveway leading to Swift and Company's plant.

[fol. 522] Q. Do all hogs and sheep pass over that line running at right angles to Exchange Avenue and parallel to Racine Avenue?

A. That would be the artery they would use in order to drive the animals to their plants.

Q. Do cattle take different routes?

A. Cattle can be driven on an overhead runway between platforms 5 and 7 to the beef kill house located on Packers Avenue south of the Chicago Junction switch and lead tracks crossing Packers Avenue.

Q. Now, you have testified that often coming from particular chute pens animals are driven over various routes.

A. That is right.

Q. The Examiner asked you what the reason was for that, whether it was due to congestion in the yards, or what it was due to, and you said you could not answer the question. What was the difficulty about the question?

A. I did not understand the question at that time, but I can answer that that is due to congestion, or they will take the nearest route to these plants.

Q. That is available?

A. That is available, yes. There may be congestion in the alley which will necessitate them going either left or right down another alley, but they finally terminate at the same place.

Q. What did you think the Examiner was asking you about?

[fol. 523] A. I thought he meant what was the reason for that congestion. I could not very well answer that question, the reason for the congestion.

Mr. Blanchard: May I straighten up one thing and get the record straight?

By Mr. Blanchard:

Q. You stated that animals, wherever they were taken in the stock yards by Swift and Company, would proceed to this main artery you spoke of by the nearest route, unless congestion interfered, is that correct?

A. Yes.

Q. You also stated, in following Mr. Smith's finger, that animals coming into Swift and Company would follow a red line which starts in at about three inches to the right, to the east of the tracks of the Chicago Junction, shown on the west side of the map, and which proceeds south across Exchange Avenue and then jogs to the west and south parallel to Racine Avenue and then into Racine Avenue.

Mr. Smith: Are you inferring when you say that the witness followed my finger, that I pointed that out to him on here?

Mr. Blanchard: Yes. I stood here and saw you do it.

By Mr. Smith:

Q. Did you understand I was doing that?

A. No.

By Mr. Blanchard:

Q. What I want to bring out is that Swift and Company is first tendered delivery of a carload of hogs in the area near where the white letter D-15 appears.

[fol. 524] A. Yes.

Q. You do not mean to say they would go clear up here through the sheep house and go into this red line Mr. Smith pointed out, and then go into the plant?

A. No. If you will remember, I testified that that artery right there (indicating)——

Mr. Smith: Which artery?

The Witness: South of Exchange Avenue, near Racine.

By Mr. Blanchard:

Q. From that point into Racine Avenue is the only common artery?

A. That is correct.

Q. That is, about where the white area immediately north, on the map, three inches north of Armour & Company's

office, appears in an enclosed point, immediately from there west is the only common artery that is used by all hogs going into Swift's?

A. Overhead.

Mr. Blanchard: Yes.

Mr. Smith: What is the situation as to Swift? That is what I asked about, was Swift.

Exam. Carter: He was referring to Swift.

Mr. Smith: I thought he said Armour, at the very last moment.

Exam. Carter: Read Mr. Blanchard's question.

(Question read.)

By Mr. Smith:

Q. Now, how far is it from that point where the little [fol. 525] white area is to Racine Avenue, approximately?

A. A distance of 100 feet.

Q. So that short distance of 100 feet is the only common conduit or route which all of the hogs take going into Swift's?

A. Into that particular house, yes, Mr. Smith.

Q. Yes. Up to that point they may take many routes?

A. Yes.

Q. Are they all overhead routes?

A. No, not all of them. They are either on the ground or overhead.

Q. And are those you have indicated here by these red lines typical of routes that exist?

A. Yes. They may be on the ground, on the level of the ground, or overhead, on the second floor.

Q. Now, is there any route taken by Armour traffic that is the same with reference to all traffic? Is there any point of conjunction where the animals all come together and are driven over one route?

A. Yes; the Big Four.

Q. Where is the Big Four?

A. It is south of Exchange Avenue, east of Racine.

Q. Point it out on the map.

A. Here it is (indicating).

Q. It is just north—just east of Racine and east of D-5 on the map, is it?

[fol. 526] A. It is the blank vacant property in the rear of Armour & Company east of Racine Avenue and South of Exchange.

Q. Up to that point the animals take various routes depending upon which route is taken by the employees of Armour, who drive them?

A. That is correct. But, to make this clear I might say that as to artery No. 4 there is no entrance or exit from the sheep house, from this point.

Q. What is the significance of that? What point do you make there?

A. It is a second story. There is no entrance or exit from that point, from the sheep house.

Q. You have been referring to the exhibit which has been identified as Defendants' Exhibit No. 24, have you not?

A. If this is Exhibit 24, yes.

Q. Calling your attention to the identification mark, I will ask you if you have been referring to exhibit 24.

A. I have.

Mr. Smith: We offer exhibit 24 in evidence, if the Examiner please.

Exam. Carter: You have no objection to that exhibit, have you, Mr. Rynder?

Mr. Rynder: Yes.

Exam. Carter: Very well. You may state it.

Mr. Rynder: It may be overruled, but I want to state my [fol. 527] objection. I object upon the ground the exhibit is immaterial to any issue in this case. The Examiner must realize from the factual situation developed up to this time that no matter what route was used, no matter what facilities were used, we incurred the 45 cent charge. If an animal consigned to us got out of the unloading pen into the chute alley, even under its own power, we incurred the 45 cent charge. If we drove it through these facilities we incurred the 45 cent charge. If the stock yards put it in a receiving pen we incurred the 45 cent charge. In other words, as stated in Mr. Leonard's letter of May 10th, 1933, on behalf of the Union Stock Yard and Transit Company of Chicago: "I beg to hereby formally advise you that the property of the Union Stock Yard and Transit Company of Chicago is its private property and that its tariffs are on file with the properly constituted authorities. Unless and until your threat of not paying the tariff charges of

the Union Stock Yard and Transit Company of Chicago is withdrawn and until and unless such charges are paid, this company will not permit this livestock consigned to you at these yards to be delivered to you or your employees on and after May 25, 1933." I would like to offer an objection now to exhibit No. 23 for the same reason.

Mr. Smith: Is the exhibit received?

Exam. Carter: I will receive the exhibits subject to your objection.

[fol. 528] Mr. Rynder: With all due respect, may I note an exception?

Exam. Carter: You may note an exception.

Mr. Rynder: Thank you.

(Defendants' Exhibits Nos. 21 to 24 inclusive, Witness Hoffmann, received in evidence.)

Mr. Smith: As to this marking on this exhibit 1, I might say to the Examiner that I do not think it is highly material, but the engineering witness attempted to identify some of these runways and I thought it might be somewhat enlightening to have some of them marked in red. That is the purpose of it.

Exam. Carter: Very well. Proceed.

Mr. Smith: Is exhibit 24 received?

Exam. Carter: Yes.

By Mr. Smith:

Q. You were asked to show the lines upon whose team tracks the traffic was delivered and unloaded, shown on exhibit 21.

A. Yes.

Q. Have you before you a statement showing those lines upon which those deliveries were made?

A. I have.

Q. Will you state them, please.

Mr. Rynder: Just a moment. Was that also not to include the locations?

Mr. Smith: Well, I thought I would ask him one question at a time, if that is satisfactory.

[fol. 529] Mr. Rynder: I have no objection to asking one question at a time. I wondered if that was not the end of it.

By Mr. Smith:

Q. Go ahead, Mr. Hoffmann.

A. Shall I read the railroads and their locations?

Q. That is all right. Read the railroad and its location and how many cars were unloaded on that team track.

Mr. Rynder: Go slowly so we can copy this down, please.

Exam. Carter: I did not hear that.

Mr. Rynder: I asked him if he would go slowly, so we could copy it down.

The Witness: The Alton Railroad, 15th and Morgan, no cars received.

Mr. Blanchard: None, you said?

The Witness: Yes.

Exam. Carter: None.

Mr. Blanchard: All right.

By Mr. Smith:

Q. Where is 15th and Morgan? Indicate in each instance, if you can, as you read them off there, the approximate location in relation to the Union Stock Yards.

A. Approximately three and a half miles from the Union Stock Yards.

Q. Proceed.

A. The Atchison, Topeka & Santa Fe, 21st and Purple Street.

Q. 21st and what?

A. Purple, P-u-r-p-l-e; 7 cars received. It is 2½ miles, [fol. 530] or approximately 2½ miles from the Union Stock Yards.

Mr. Blanchard: Tell us where Purple Street is with reference to some section line streets, like Halsted, for instance.

The Witness: It is one block east of 22nd Street on Archer Road.

Mr. Blanchard: Wait a minute.

The Witness: Just a minute. Let me get this straight.

Mr. Blanchard: That would be east of Halsted Street?

The Witness: West of Halsted Street.

Mr. Rynder: West?

The Witness: No; east of Halsted Street.

Mr. Blanchard: East of Halsted Street?

The Witness: Yes.

Mr. Blanchard: All right.

The Witness: That is right.

Mr. Blanchard: Go ahead.

The Witness: The Chicago & Eastern Illinois, 33rd and Normal, 47 cars received.

Mr. Blanchard: 47?

The Witness: 47. That is approximately one and a half miles from the Union Stock Yards. The Chicago and North-Western Railway, 15th and Morgan——

Mr. Blanchard: Is that the same as the Alton?

The Witness: It is right across the street—or, across the track from the Alton Railroad.

[fol. 531] Mr. Blanchard: All right.

The Witness: 202 cars received. That is approximately three and a half miles from the Union Stock Yards. The Chicago, Burlington & Quincy Railroad, 16th Street and Racine Avenue, 57 cars received. That is approximately three and a half miles from the Union Stock Yards. The Chicago Great Western Railroad, Harrison and Wells, no cars received. That is approximately a distance of five miles from the stock yards.

Mr. Blanchard: Harrison and Wells?

The Witness: Yes.

Mr. Blanchard: Is that their passenger station?

The Witness: No. That is about 303 West Harrison Street. The Chicago, Milwaukee, St. Paul & Pacific, Peoria Street, no cars received,—wait a minute. I want to correct that. The exact address is 321 North Peoria.

Mr. Blanchard: That is Peoria and Lake?

The Witness: About Kedzie.

Mr. Blanchard: That is right; about Kedzie.

By Mr. Smith:

Q. As to the Milwaukee, are there any cars received at their team track, which are included in exhibit No. 22?

A. They are not included, Mr. Smith.

Q. Were there cars of livestock received at those team tracks?

A. There were eight.

Q. I beg your pardon?

[fol. 532] A. Wait a minute. There were two cars per month, or a total of 25 cars a year.

Q. Why were they not included in this exhibit?

A. Because they were horses, carloads of horses and I was instructed by Mr. Smith not to include horses in this exhibit.

Q. Proceed, please.

Mr. Rynder: Do I understand that there were none received at the Milwaukee yards you just described?

Mr. Smith: I cannot hear that. Was that a question?

Mr. Rynder: I say, I understood none, at the yards he just described.

Mr. Smith: Well, you did not hear what the witness said. Do you want the reporter to read the record?

Exam. Carter: He said there were 25 cars——

The Witness: That was horses.

Exam. Carter: He said that 25 cars of horses were received, and no sheep, cattle or hogs or calves.

Mr. Smith: That is about 25 cars a year.

Exam. Carter: Yes.

Mr. Smith: During this three-year period.

Mr. Blanchard: While there has been an interruption, let me ask this: is this for—what period is this for? I did not catch that.

Mr. Smith: The same period we are talking about here in the exhibit. The 25 cars is on a yearly basis.

[fol. 533] Mr. Blanchard: I see.

The Witness: Horses are not included in exhibit 21.

By Mr. Smith:

Q. Proceed, Mr. Hoffmann.

A. The Chicago, Rock Island & Pacific, Root and Wentworth, 2 cars received. That is three-quarters of a mile, or approximately three-quarters of a mile from the Union Stock Yards. The Illinois Central, at Bridgeport Yards, at Archer Avenue and Leo Street—Leo Street is one block west of Halsted—1,272 cars. That is a distance of two miles from the Union Stock Yards. The Soo Line Railroad, Roosevelt and Canal, no cars received. That is five miles from the Union Stock Yards, approximately. The Wabash Railroad, 43rd and Normal, 972 cars. That is approximately three-quarters of a mile from the Union Stock Yards.

Mr. Rynder: What was that, 972?

The Witness: Yes.

By Mr. Smith:

Q. Does that complete your statement?

A. That completes it.

Mr. Smith: I will now ask to have this next document identified as exhibit 25.

(Defendants' Exhibit No. 25 marked for identification.)

By Mr. Smith:

Q. I call your attention to an exhibit marked for identification as exhibit 25, which bears the caption, "Statement of Cars of Livestock Received at Union Stock Yards, Chicago, Illinois, Via All Roads, Showing Those Taken By the [fol. 534] Consignees At Unloading Chutes and Those Yarded and Taken By Consignees From Holding Pens, By Months For The Year 1937."

A. Yes.

Q. I will ask you whether or not that was prepared under your supervision.

A. It was.

Q. Does the figure 91,532 at the bottom of the second column on the left, represent the entire numbers of cars received during that year at the Union Stock Yards for all consignees?

A. Yes.

Q. You have divided that between those of which possession was taken at the unloading chutes, and those of which possession was taken by the consignees at holding pens?

A. That is correct.

Exam. Carter: Now, does this represent direct shipments only, or all shipments?

Mr. Smith: No. This represents all shipments.

Exam. Carter: All shipments?

Mr. Smith: All shipments during 1937.

Exam. Carter: Very well. Proceed.

By Mr. Smith:

Q. Are the facts and figures shown on this exhibit true and correct to the best of your knowledge and belief?

A. They are.

Mr. Smith: I offer Defendants' Exhibit No. 25 in evidence, if the Examiner please.

[fol. 535] Exam. Carter: Is there any objection?

Mr. Rynder: Well, just the objection that it is immaterial to any issue here.

Exam. Carter: Exhibit 25 will be received in evidence subject to that objection. You may note an exception, Mr. Rynder.

(Defendants' Exhibit No. 25, Witness Hoffmann, received in evidence.)

Mr. Smith: I will ask to have this next document identified as exhibit 26.

(Defendants' Exhibit No. 26 marked for identification.)

By Mr. Smith:

Q. I hand you, Mr. Hoffmann, what has been marked as exhibit No. 26 for identification, which bears the caption, "Statement Showing Number of Cars of Livestock Received At Union Stock Yards, Chicago, Illinois, for the First Four Months of 1938, those Consigned Direct to the Packers And Those Consigned To The Commission Firms, Showing Those Taken By Consignees At Unloading Chutes And Number Taken By Consignees At The Holding Pens."

A. Yes, sir.

Q. I will ask you whether or not that was prepared under your supervision.

A. It was.

Exam. Carter: Is there any objection to the receipt of exhibit 26 in evidence?

Mr. Rynder: I object to it as immaterial.

[fol. 536] Mr. Smith: Mr. Examiner, I think the purpose of this is evident, but it is prepared and offered to show that the commission firms or the producers who own the shipments consigned to the commission firms take a substantially greater proportion of their stock from the unloading chutes than do the packers. I call your attention to the showing here as to cars consigned to commission firms.

By Mr. Smith:

Q. Do the employees of the Union Stock Yards drive commission firm livestock or livestock consigned to commission firms, from the unloading chutes to the sales pens of the commission firm?

A. No, they do not.

Q. Who does that driving?

A. Employees of the commission firms.

Mr. Rynder: I want to object again there.

By Mr. Rynder:

Q. You have not followed all of the shipments have you, Mr. Hoffmann?

A. Not all of them, no.

Q. Have you followed half of them?

A. That would be 10,000 cars. No. I would not say I had followed that many.

Q. 10 per cent of them? I mean, did you actually follow the shipments?

A. 10 per cent?

Q. I mean, follow it from one point to the commission pen.

[fol. 537] A. Just a second before I answer that question.

Mr. Smith: Speak up so I can hear you, please. I cannot hear you.

The Witness: I am trying to figure whether I followed 10 per cent of these 10,286, Mr. Smith,—or rather, 20,286.

Mr. Smith: I am perfectly willing to concede that the witness has not followed all of these cars, or the majority of them, and nobody in the yards has; and if we can only elicit testimony from a man who has followed every car in the yards we cannot put on any before the Commission, because nobody has done it.

Mr. Rynder: Personally, I think it is utterly immaterial, but do you not know it to be a fact that the stock yards by its tariff holds itself out to do that service, and that any man is entitled to that service by paying the yardage charge?

Mr. Smith: You say they are entitled to have the cattle driven by the employees of the stock yards?

Mr. Rynder: Yes.

Mr. Smith: Mr. Henkle testified in the Hygrade case, and will testify tomorrow unless he changes his mind in the meantime, that the yards does not hold itself out to so drive these animals. That is not a matter which can be argued here. He said in that case they did not.

Exam. Carter: I might say that he said in another case I heard, the same thing. He made the same statement. I [fol. 538] do know Mr. Henkle so testified in I & S 4296 and I & S 4109.

Mr. Blanchard: I suggest, Mr. Smith, in view of the record in that Hygrade case, if he finds out he is correct in stating what Mr. Henkle testified to, as to commission men, advise us, and if not, we will correct the statement.

Mr. Smith: Mr. Blanchard, I am extremely grateful to you for the help which you constantly are attempting to give me, but I do not feel I need it.

Mr. Blanchard: If you are right, you ought to be proud to be able to point to the page of the record at which the statement is made. If you are wrong, you ought to be willing to advise the Commission.

Mr. Smith: I think that will be thoroughly explored before the case is over.

Exam. Carter: Correct me if I am wrong in this understanding: I think I understood from Mr. Reneker—he may not be the one—but, I think I understood from one witness in this proceeding that most of the livestock consigned to commission firms was driven by commission firm employees. Did you so testify, Mr. Reneker?

Mr. Reneker: Yes, with the exception of all sheep and lambs. They are all delivered to the pens by the yard company's employees.

Mr. Blanchard: That is what I had in mind.

By Mr. Smith:

Q. Just explain how sheep are handled down there, please.

[fol. 539] A. Sheep are driven from the unloading chutes down alleys to holding pens in the sheep house by employees of the stock yards company, but not in the sales pens of the respective firms.

Q. Who drives them from the holding pens to the sales pens?

A. Commission firm employees.

Exam. Carter: Let me ask one question there.

By Exam. Carter:

Q. Are you speaking of shipments coming in at night? Is there that qualification to your statement? What about shipments that arrive, say, during the night?

A. They are yarded by the stock yards company.

Exam. Carter: We had that testimony in the record. I just wanted to get that clear.

Mr. Rynder: I would like to be permitted to interrupt, since that question has arisen; let me say that on page 215 of the hearing in the Hygrade case Mr. Henkle says: "If the consignees are not present to take delivery of animals consigned to them immediately upon the placement at the chute pens, they are removed from the chute pens to other pens by employees of the yard company."

Mr. Smith: There is no question about that, Mr. Rynder. I do not believe we are in any disagreement about this point. I do not think Mr. Reneker said anything other than Mr. Hoffmann has said. These animals are driven, this record shows, and these other records show, by commission [fol. 540] firm employees from the holding pens to their own pens, if they take delivery there. If that does not happen, then the stock yards employees drive them to holding pens, and from that point commission firm employees pick them up. With reference to sheep, those movements from the unloading chutes to the sheep house pens are always made by the employees of the yard company and are then made from that point to the sales pens by the commission firm employees. I do not think Mr. Reneker said anything different than that. Now, is there a question pending, or may I proceed?

Mr. Reneker: I did say something different, Mr. Smith.

Mr. Smith: All right.

Mr. Reneker: I do not know whether you want it or do not want it.

Exam. Carter: What you said is in the record, Mr. Reneker.

Mr. Reneker: Correct.

Mr. Smith: What is the last question, Mr. Reporter?

(Question read.)

Mr. Smith: I now offer in evidence Defendants' Exhibit 26, Mr. Examiner.

Exam. Carter: Is there any objection?

Mr. Rynder: Yes; the same objection, that it is immaterial to any issue in this case, and far from wanting to have anything to do with the proposition here portrayed, we are trying to completely avoid it.

Exam. Carter: Exhibit 26 will be received in evidence sub- [fol. 541] ject to objection. You may note an exception.

(Defendants' Exhibit No. 26, Witness Hoffmann, received in evidence.)

Mr. Smith: Mark this as Defendants' Exhibit No. 27 for identification.

(Defendants' Exhibit No. 27 marked for identification.)

By Mr. Smith:

Q. I hand you, Mr. Hoffmann, exhibit 27 for identification, which is headed "Statement of Cars of Livestock Received at Union Stock Yards Over the Western Lines Consigned Directly to Packers Located in Chicago, Illinois, Other Than Complainants."

A. Yes.

Q. I will ask you if that exhibit was prepared at my request under your supervision.

A. It was.

Q. In the year 1935 it purports to show that there were 18,131 cars of livestock consigned directly to packers received at the Union Stock Yards in Chicago. Is that a correct interpretation of the exhibit?

A. Other than complainants, yes.

Q. Other than complainants.

A. Yes.

Q. This does not include the fairly good-sized volume that complainants had in 1935, and the scattering shipments they had in 1936 and 1937?

[fol. 542] A. That is correct.

Q. Are the facts and figures there shown true and correct to the best of your knowledge and belief?

A. They are.

Mr. Smith: If the Examiner please, we now offer in evidence Defendants' Exhibit No. 27.

Exam. Carter: Is there any objection?

Mr. Rynder: No objection.

Exam. Carter: Exhibit 27 will be received.

(Defendants' Exhibit No. 27, Witness Hoffmann, received in evidence.)

By Mr. Smith:

Q. That completes the group of exhibits that you prepared, does it not, Mr. Hoffmann?

A. Yes, sir, it does.

Mr. Smith: I think that is all.

Exam. Carter: You may cross-examine.

Cross-examination.

By Mr. Rynder:

Q. Mr. Hoffmann, you were speaking in the first part of your testimony about certain public streets in the neighborhood of the stock yards being rather congested from a traffic standpoint.

[fol. 543] A. Yes.

Q. It is nevertheless true that all kinds and classes of traffic freely flow up and down Ashland Avenue, for instance, and east on 39th Street, and so forth, is it not?

A. That is correct; all classes of trucks and passenger cars.

Q. Do you ever drive down that route yourself?

A. I do, every morning and night.

Q. Well, I happened to do that this morning, taking, I think, from 20 to 25 minutes to this hotel, including stops at stop lights, not breaking any speed laws; would you consider that an unusual length of time?

A. From what point?

Q. Swift's office building.

A. Swift's office building?

Q. At 42nd Street, against the stop light; then turning north on Ashland; then coming east on Jackson.

A. At what hour in the morning?

Q. I left out there at quarter of nine.

A. Quarter of nine.

Q. Yes.

A. I would say it is possible to make it in 25 minutes.

Exam. Carter: I suppose that depends, too, upon what kind of a driver you are.

The Witness: It could be done, Mr. Rynder, in 25 minutes. I will not say whether you will get here safe, sound [fol. 544] or otherwise.

By Mr. Rynder:

Q. You would not add more than five or six minutes on that, would you?

A. No. I would say in 25 minutes you can get down here without breaking any speed laws, but the point I wanted to bring out there, Mr. Rynder, was this: on Pershing Road they do have a tendency, the minute they get over that bridge, to cut loose and give her the gun to Halsted Street.

I have seen three arrests just recently on that part of the road.

Q. I happened to not be doing that.

A. I will agree with you. There is also a sign on Pershing Road that says "25 miles an hour".

Q. Yes. But, while there is a good bit of traffic up and down Halsted Street—or rather, I mean Ashland Avenue, and some signals to slow you up, nevertheless traffic moves freely back and forth; it does not get into jams that stop it much, does it?

A. There are jams on Ashland Avenue at the Chicago Junction tracks where it narrows.

Q. Where it narrows?

A. Yes. There is a bottle-neck there at the Chicago Junction tracks.

Q. Yes.

A. We counted 943 automobiles going north and south at 39th, or Pershing Road.

Q. That is right. There is a bottle-neck there. That is [fol. 545] almost in front of the Wilson office building, is it not, or just north of it?

A. Approximately 100 feet from the general office building.

Q. All of the traffic that is going south on Ashland and all of the traffic going north on Ashland does get itself through the bottle-neck?

A. Oh, yes; eventually, yes.

Q. It is merely a matter of having to wait your turn, and running slowly there for a little while?

A. Yes. That is right.

Q. You know that that situation does not impede Swift and Company in bringing its truckloads of hogs from the Omaha plant into 42nd Street, and then to its plant?

A. They do that.

Q. They do it?

A. They do, yes, sir. They bring their hogs down Ashland to 42nd Street, make a left hand turn on 42nd Street into the unloading chutes at 42nd near Packers Avenue, on the north side of 42nd Street near Packers.

Q. You have never seen any of them stopped other than by a stop light, have you?

A. No; I cannot say that.

Mr. Smith: I might say, if it is a matter of interest to you, Mr. Rynder, that I recognize you are moving this very

traffic in just that way. I put this evidence in the record be- [fol. 546] cause I thought it might be interesting in view of the possibility of some 20,000 cars of livestock being translated into truckloads, moving in this neighborhood. That is the point of it, if that means anything to you.

Mr. Rynder: 20,000 cars in what period?

Mr. Smith: Well, that was a little overstatement, I think. I was referring to the showing in the last exhibit which was offered, although in earlier years I understand it has been greater.

Exam. Carter: 18,131 is the total.

Mr. Rynder: 18,131 for the year?

Mr. Smith: It was 19,574 in 1936.

Mr. Rynder: Let us call it 20,000 in round numbers. That would be slightly more than three additional trucks an hour, I take it, would it not?

Exam. Carter: That 18,131, not including complainants.

Mr. Smith: That is right.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. You were speaking about, yesterday, some kind of—did you call it a mechanical horse?

A. No; a portable horse.

Q. A portable horse?

A. Yes. It is a wooden horse.

Q. That was across Transit Avenue at the north side of the Chicago Junction tracks. I am now placing before you [fol. 547] exhibit No. 20. You will note where the words "Transit Avenue" are marked on exhibit 20.

A. Yes.

Q. About where was that wooden horse?

A. Well, Mr. Rynder, this map does not show the exit from Transit Avenue to Pershing Road, but it is approximately in this area (indicating).

Q. Well, it is approximately, on this map——

A. At Racine Avenue and Pershing.

Q. Just locate it so it will be clear in the record. It would be on Transit and about south of the space between the word "Pershing" and the word "Road", is that right?

A. That looks right to me.

Mr. Smith: That is right.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: Let us have the record show the situation.
Exam. Carter: Back on the record.

By Mr. Smith:

Q. There has been a good deal of reference here, Mr. Hoffmann, to Packers Avenue and Transit Avenue. Packers Avenue does not continue on north to and intersect with Pershing Road or 39th Street, does it?

A. It does not.

Q. But at a certain point south of 39th Street its name is changed, or it runs into a street, public or private, called [fol. 548] Transit Avenue, which angles north and east and finally runs parallel?

A. That is not correct.

Q. Where did my statement become incorrect?

A. Right there (indicating).

Q. That is, it does not ever run parallel to 39th Street?

A. It did at one time, but it is closed now since the bridge was placed over Racine Avenue.

Q. So, from the point Mr. Rynder identified as being approximately south of Pershing Road, or approximately south of the words "Pershing Road", it continues on north into 39th Street?

A. That is correct. There is an underneath tunnel, if you call it a tunnel. From the right side of Pershing Road—or from the north side of Pershing Road you may enter Racine Avenue from the right and you may enter Pershing Road from the left.

Q. You stated this, that so-called Transit Avenue was closed to anyone going south from 39th Street after 7 o'clock, and that there was a movable wooden horse put across the road. Was that put across so-called Transit Avenue at this point identified by you and Mr. Rynder?

A. It was placed across Transit Avenue at the Chicago Junction switch tracks running across Transit Avenue at the point brought out.

By Mr. Rynder:

Q. You do not know of any obstruction if livestock should be moved to the east end of the yards, from the west end [fol. 549] of the portion of the yards indicated by, say, one and three to Packers Avenue and thence south, do you?

A. I do know that at the present time you cannot drive livestock from the alley, or truck livestock from the alley of 1 across this switch track at this time. You can from platform 3, but not from 1, from the west end of 1.

Q. There is no physical obstruction that stops livestock going——

A. From platform 3? No, if that is your question.

Q. Out Packers Avenue and then south.

A. From platform 3.

Q. And the gate you mentioned is north of the place that one would reach going westward from platform 3?

A. I did not mean the gate, Mr. Rynder.

Q. I am sorry; I meant, the horse.

A. The horse.

By Mr. Smith:

Q. You spoke about a switch track between so-called Packers Avenue and those unloading chutes. Is there one track or more?

A. There is one track leading into or back of platform 3, which was, and I believe is now, being used for loading manure in gondolas.

Mr. Smith: What was that answer? Read it please, Mr. Reporter.

(Answer read.)

By Mr. Smith:

Q. In driving livestock from the north end of those tracks [fol. 550] to Packers Avenue, would one track be crossed or more than one track?

A. From platform 3 no tracks would be crossed.

Q. Between there and Packers Avenue?

A. Between the west end of platform 3 and Packers Avenue there would be no tracks crossed.

Q. Does any traffic move over that space now?

A. Not any to my knowledge.

Exam. Carter: You mean, does any livestock traffic move over that street?

Mr. Smith: I beg your pardon.

Exam. Carter: Were you referring to livestock?

Mr. Smith: Any kind of traffic.

By Mr. Smith:

Q. Is there any kind of traffic moving over that space?

A. Not to my knowledge, Mr. Smith.

Mr. Rynder: You are speaking of your knowledge.

By Mr. Rynder:

Q. Have you looked at it recently?

A. Yes.

Q. Have you seen wagon tracks on there?

A. Yes. I cannot say whether they were made this year or last year or the year before.

Q. Neither can I, but I saw them last Thursday. Would you not rather think they would be obliterated by winter rains and snow, if they had been made a year ago?

[fol. 551] A. That road bed is quite solid. I will agree with you that there is a manure pile at the south of this dirt road. Whether they load trucks or not is another question. Whether they load this manure on trucks, I would not say.

Q. How recently have you looked at it?

A. Last night.

Q. There were wagon tracks there?

A. It appears that at some time or another there was a wagon on that particular road. I will not say when they were made.

Q. No. I do not know myself.

A. No.

Q. As to these team track deliveries of livestock mentioned in your exhibit No. 21, have you examined these various facilities where the deliveries were actually made?

A. Yes, I have.

Q. What facilities are there for unloading livestock?

A. The track. There are no pens, no unloading pens.

Q. The track, and I suppose the level land beside the track?

A. That is right.

Q. And an open space beside the track.

A. Right.

Q. How does the recipient of the livestock get it?

A. They back their trucks up against the car door.

Q. They back their trucks up against the car door?

A. Yes.

[fol. 552] Q. And move the livestock into the truck?

A. That is right.

Q. How does one arrange to get truck delivery of live stock?

A. How do they arrange it?

Q. Yes.

A. I do not know that.

Q. What billing do they put on in order to obtain it?

A. I do not know that, Mr. Rynder. I am not qualified to answer that question.

Q. Shipments which were billed merely to Chicago over one of these inbound carriers—would they be given such a delivery?

A. That I could not answer. I am not qualified to answer that question.

Q. According to this exhibit, that practice has been going on for a full three years and I suppose continued into 1938, is that right?

A. Correct.

Q. The total number of cars you have shown as received on team track deliveries amounts to approximately two cars per day, does it not, for all team track deliveries?

Mr. Smith: That is a matter of arithmetic. I think counsel can figure that out.

Mr. Rynder: I know, but I will ask him then to assume that.

By Mr. Rynder;

Q. Do you know how extensive these unloading facilities are at these team track deliveries?

[fol. 553] A. How extensive the facilities are?

Q. Yes.

A. Well, there may be two or three team tracks that they may switch this car into, and unload it on that team track.

Q. You say there may be.

A. Well, there are several tracks.

Q. At any one of them that you please, taking it off the list you read, can you tell me how many livestock cars could be placed at one time for unloading so the receiver could take them away?

A. Well, we will take the Illinois Central at Archer and Leo.

Q. That is the biggest one on the list, is it not?

A. 1,272 cars.

Q. Yes.

A. If the track space was clear of other——

Mr. Smith: Mr. Hoffmann, turn so the reporter and the Examiner can hear you.

Exam. Carter: Let us take a five minute recess.

(Short recess.)

Exam. Carter: Come to order, gentlemen. Let us have the last question and answer read.

(Question and answer read.)

The Witness: (Continuing)—of all other cars, 25 cars of livestock I would say, approximately 25 cars, could be spotted at this team track.

[fol. 554] By Mr. Rynder:

Q. How many?

A. 25.

Q. What was actually spotted there was approximately one and a half a day, was it not?

A. Well, there are 1272 spread over a three year period. Whether there was one car or four, I do not know.

Q. Was the yard ever clear of other freight?

A. At the Illinois Central team tracks, I would say no.

Q. When cars are spotted on these team tracks, how do you obtain weights for the purpose of assessing freight charges?

A. Those firms are under a weight agreement with the Western Weighing and Inspection Bureau the same as Swift and Company. We accept the weights obtained over their hoof weight scales, which are inspected by the Western Weighing and Inspection Bureau.

Exam. Carter: Mr. Hoffmann, talk toward the reporter.

The Witness: I beg your pardon.

Exam. Carter: He will have difficulty hearing you.

The Witness: I see.

By Mr. Rynder:

Q. So far as you know, have conditions as to availability of these team tracks changed since 1935, the facilities for handling livestock?

A. Have they changed?

Q. Yes.

A. No.

Q. They have not?
[fol. 555] A. No.

Mr. Rynder: That is all.

Exam. Carter: Are there any further questions?

Mr. Smith: If not, I will recall Mr. Sperry.

Mr. Blanchard: Just a minute. We are intervening in this case, Mr. Smith.

Exam. Carter: That was my fault, Mr. Blanchard. I had forgotten about you for a moment.

By Mr. Blanchard:

Q. Mr. Hoffmann, I hand you a copy here of a document secured from your counsel, which I believe he will admit is a copy of the 1937 annual yearbook of the Union Stock Yard and Transit Company. Will you turn to page 15?

Mr. Smith: Mr. Blanchard asked me to loan him one of these.

Mr. Blanchard: I will be glad to return it.

By Mr. Blanchard:

Q. How many cars does that show were received by rail?

A. 91,361 for the year 1937.

Q. That is correct. How many of those cars received by rail were cars of horses?

A. 262 for the year 1937.

Q. Now, if my mathematics are correct, that leaves 91,270 cars of so-called slaughter livestock?

A. That is correct.

Q. Can you explain the slight discrepancy between that figure and your total of 91,532 cars shown in your exhibit 25?

[fol. 556] A. I will be glad to.

Q. Please do so.

A. The total figures shown in my exhibit 25 were taken direct from copies of train sheets which we have access to in Mr. Kemp's office. This train sheet is made up originally by the employees of the Union Stock Yard and Transit Company, and if there is a slight discrepancy between my report in exhibit 25 and the stock yards company yearly book for 1937, it is that there will be a number of cars shown on those train sheets that are not included in this book. By that, I mean at the end of the month, if it falls on a

Sunday, they will be taken in the next month's receipts. If after 3 o'clock of this particular day a car is received, it will be taken in the following day's receipts. Those cars shown on my exhibit 25 were taken from these train sheets.

Q. The discrepancy then is due to a difference in the hour you cut off the first and last day?

A. It is possible; that is right.

Q. I believe you said no sheep were taken from unloading chutes by any consignee, but that the stock yards company does that, because these are under cover, is that correct?

A. I believe I testified to that.

Q. Look in the book I think on page 13, and tell me how many cars of sheep—if you do not mind I will use the stock yards book figure, because I have it down here—the dis-
[fol. 557] crepancy is immaterial. How many of these remaining 91,270 cars, after deducting the horses—using your figures—deducting 262 cars of horses reduces your figure—I think I had better ask first, did you include horses in your figures of 91,532?

A. I did not.

Q. Then going back to the stock yards record, what do they show for the year, 91,000 and what total cars?

A. 91,361.

Q. Now, deducting the horses would leave 91,099 cars, of which how many cars were sheep?

A. According to this record, 10,275.

Mr. Smith: Mr. Examiner, I object to these questions with reference to the showing in the red book. I am going to offer that by Mr. Henkle tomorrow. He will be available for cross-examination.

Mr. Blanchard: The basis for my questions, it is conceded, will be in the record. I do not see any irregularity in permitting me to ask this witness to reconcile——

Mr. Smith: You are asking about a division as to sheep there. I would rather have that covered by Mr. Henkle. We have not undertaken to put that in.

Exam. Carter: I suggest that this not go into the record. You had better defer your cross-examination on that.

Mr. Blanchard: Let me reframe my question.

By Mr. Blanchard:

Q. Mr. Hoffmann, if it should appear later in this record
[fol. 558] that of the 91,099 cars of livestock other than

horses which were received during this year, 10,275 were sheep, that would leave 80,824 cars of cattle and hogs, would it not?

A. Give me a chance to figure this out. Possibly I will agree with you.

Exam. Carter: It would, if your mathematical computation is correct.

Mr. Blanchard: If it is not correct it will be obvious on its face.

The Witness: Yes.

By Mr. Blanchard:

Q. Is it your testimony that out of 80,824 cars of cattle, hogs, and calves received at the Union Stock Yards, 71,581, or approximately 90 per cent, were taken from the unloading chutes by the consignee?

A. I will say that 78 per cent of the total that is shown on my exhibit 25 were taken from the unloading chutes according to the train sheets of the Union Stock Yard and Transit Company.

Q. How do the train sheets show where delivery of the animals was taken by the consignee?

A. If yarded they will show the block and pen number.

Q. Do you know whether——

A. If delivered, they will show "Del.", or just the letter "D" in that column.

Q. Do you know what the stock yards company classifies as "yarded" in making those reports from which you prepared your exhibit?

[fol. 559] A. Would you read that question?

Mr. Blanchard: Read the question, Mr. Reporter.

(Question read.)

By Mr. Blanchard:

Q. In other words, when did they regard a carload as having been yarded, as they use that term?

A. When they took them from the unloading chutes to holding pens. That is what I would consider it.

Q. To any holding pen?

A. Yes.

Q. In other words, if they unloaded a train into the chutes opposite where the train is spotted——

A. Yes.

Q. —and immediately pull the empties and pull another train into that same position and empty those chutes, by moving them back and bringing that new trainload in, did they regard that entire first trainload as having been yarded?

A. If they placed these first animals from the first train into holding pens it would be a yardage proposition.

Q. When they moved them from pen No. 96 down to pen No. 40, and got them out of the way for another train, they would call that yarding, would they?

A. You are referring to the unloading chutes, Mr. Blanchard?

Q. Yes. Isn't that what you are referring to in your exhibit 25?

[fol. 560] A. No. This is taken from the unloading chutes at platforms and taken from holding pens, so-called yardage pens.

Q. All right. You said this was a classification, whether the animals were yarded or not yarded, that was reported to the carriers by the stock yards company; I am asking you if when the animals were removed from the pen into which they were originally unloaded into another unloading pen further down the dock——

A. On the same platform?

Q. The same platform or any other platform.

A. Yes.

Q. —to make room for a new unloading into the same original pens, is that first car classified by the yards company as having been yarded?

A. If the representative of either the commission firm or packer would call for that at that particular chute it would be termed a delivery.

Mr. Blanchard: Now will you answer my question, Mr. Hoffmann?

Exam. Carter: What this witness is trying to establish is that this livestock was taken by employees of the commission firms or packers at the unloading chutes or at the pens adjoining the unloading chutes or at the unloading pens.

Mr. Blanchard: That is what I want to get at.

Exam. Carter: As I understand it, he says there appears [fol. 561] on the stock yards company records the term "Delivery".

The Witness: "Del."

Exam. Carter: Yes "Del." Now, he testified, according to my understanding, that the term "Del." means that employees of the commission firms or packers took that stock either from the pens adjoining the unloading chutes or from the pens to which it may subsequently have been removed. Is that what you mean?

The Witness: I mean, this "Del." means that the animals were turned over to the representative of the packer or commission firm at the unloading chute.

Exam. Carter: At the unloading chute?

The Witness: If they are placed in holding pens, those pens are shown on the train sheet, and the block and pen number. I believe that will be shown in an exhibit later on, will it not, Mr. Smith?

Exam. Carter: I do not believe he has said whether or not the yards company considers those shipments as having been yarded, in either event, one or the other. But of course, the yards company does assess the yardage charges in either event, does it not?

Mr. Blanchard: Now, Mr. Hoffmann——

Exam. Carter: I say, it does, does it not? Is that your understanding?

Mr. Rynder: Yes.

[fol. 562] Mr. Blanchard: I think that is correct.

By Mr. Blanchard:

Q. Then on exhibit 25, where you say "Taken at Unloading Chutes", you do not necessarily mean they were taken at the chute into which the animal was unloaded from the car, do you?

A. Give me the question again.

Mr. Blanchard: Read the question.

(Question read.)

A. That means the figure shown—or rather, I mean, the figure which is shown under "Taken at Unloading Chutes", means that the train sheet shows 6,923 cars for the month of January marked "delivered", or "del.".

By Mr. Blanchard:

Q. Now, will you answer the question, please?

By Exam. Carter:

Q. Does that mean that the delivery was taken—I do not see that it makes a whole lot of difference, but it may.

Mr. Blanchard: It will, Mr. Examiner.

By Exam. Carter:

Q. With reference to that "del.", does that mean it was taken at the original unloading pen, or taken at the original pen into which it was placed from the unloading chute, or could it possibly mean it was taken from a pen aside, for instance, from the first pen from which it was unloaded?

A. The original pen.

Q. The original pen?

A. Yes.

By Mr. Blanchard:

[fol. 563] Q. How many unloading pens are there available for the handling of stock?

A. The last time I tried to determine that, Mr. Blanchard, 325 cars could be spotted, two chutes to a car.

Q. How many cars could be—would be required to fill every unloading chute there is available there for the unloading of line haul livestock?

A. Well, if 325 cars could be spotted and there were two chutes to a car, that would be 600 cars.

Q. That is, 650 cars would be the maximum that could be handled in one day without removing some of those animals from the original chutes into which they were unloaded?

A. Some of those unloading chutes are not available at this time for use, Mr. Blanchard.

Q. You are speaking of the chutes of the animals that have to be disinfected—where they have to be unloaded, are you not?

A. No.

Q. How many are available now—how many chutes are available, so if you filled every available chute directly from the car; how many cars could you handle?

A. About 300.

Q. About 300?

A. That is right.

Q. At one time?

A. That is right.

[fol. 564] Q. Now, do you know of any commission men who have any employees on the job there after they finish their driving for the day, say around 4 or 5 o'clock in the afternoon, before 6 or 6:30 the next morning?

A. Yes, I do.

Q. Will you name them?

A. Chicago Producers.

Q. Who else?

A. I do not know of any others, Mr. Blanchard, right offhand.

Q. Is the Chicago Producers a large or relatively small commission firm?

A. It is the largest commission firm in the U. S. Yards.

Q. Do you know that there are many commission firms who do not have drivers engaged on duty during the night, do you not?

A. That is correct.

Q. You also know that the majority of this livestock unloaded at Chicago arrives during the night, do you not?

A. What do you mean by "night", Mr. Blanchard?

Q. 6 P. M. to 6 A. M.

Mr. Smith: I am going to show when it arrives, if that will make it easier for you. I have not shown it by this witness.

Mr. Blanchard: I will be glad to have the exact figure.

Mr. Smith: We have not shown it yet.

Mr. Blanchard: Tell the witness whether the answer to [fol. 565] that question is "Yes" or "No", and I will accept it.

Mr. Smith: You do as you like.

The Witness: I can answer the question.

Mr. Blanchard: Either tell him the answer, or let him answer on his own.

Exam. Carter: You mean, the hours at the unloading pens for unloading?

Mr. Blanchard: The hours at the unloading docks for unloading.

The Witness: Do you want me to answer the question?

Mr. Smith: I am not objecting.

The Witness: The majority of livestock is received between 12 midnight and 8 A. M.

Mr. Blanchard: Now, will you answer the question? I asked you about between 6 P. M. and 6 A. M.

The Witness: I would say "No" to that question.

By Mr. Blanchard:

Q. What proportion of stock received between midnight and 8 A. M. is received between midnight and 6 A. M. then?

A. A great proportion of it.

Q. The greater proportion of it?

A. Yes.

Q. There are, during those hours, a number of commission men who have no employees on the job for driving live-stock, is that correct?

[fol. 566] A. I will answer that question this way: the commission firms have men out there about 6 o'clock in the morning.

Q. So that, except as to, roughly, 9,000 cars, or 10 per cent of the total receipts of cattle, hogs and sheep, if my previous figures can be assumed to be correct—they are moved by employees of the yard company, notwithstanding that a large proportion of the deliveries arrive at a time when there are no employees of the consignee there to receive them?

A. I will say from my information that 22 per cent of them were taken from holding pens.

Q. That is out of 91,975; I have asked you to assume that 10,275 of those were sheep.

A. I did not give the number of sheep or the number of cattle or the number of cars of hogs in order to arrive at this.

Q. You have conceded however that out of this 19,951 cars taken from holding pens, all of the sheep, no matter how many cars there were, were included in that figure, did you not?

A. They were included in that figure taken from holding pens, yes.

Q. Now then, whenever we find out what this number of cars of sheep is, if we substract it from 19,951 we will have the number of cars of hogs, cattle and calves taken from the unloading pens, or taken from the holding pens?

A. Taken from the holding pens, yes; that is correct.

Q. And if it should appear that was only 10 per cent of the [fol. 567] total receipts, are you willing that this record should stand, that 90 per cent of the total receipts of live-

stock—or, of hogs, calves and cattle are taken direct from the pens into which they are unloaded by the consignee?

Exam. Carter: Well, the exhibit shows the percentage, does it not? Which exhibit is that that shows the percentage?

Mr. Blanchard: 25.

The Witness: Exhibit 25.

Exam. Carter: He has prepared an exhibit in which he has shown that percentage which you are asking him to make a computation of, based on certain assumptions of facts which are not yet in the record.

Mr. Blanchard: Which will ultimately be shown of record.

Mr. Smith: I object to it, Mr. Examiner.

Mr. Blanchard: I first asked him, whatever the number of cars of sheep was, if shown of record, that would probably be subtracted from this 19,951, and he said "Yes". Then I asked him if it should appear if that left 9,000 cars as the total cars of cattle, calves and hogs removed from the unloading pens, would he wish his testimony to stand, that only 10 per cent, roughly, of the 91,000 total of all species were taken from the—I should say 12 per cent, of 81,000,—I am taking the sheep out on both sides—were taken from the pens into which they were unloaded by the consignee.

Exam. Carter: In other words, you are asking whether he [fol. 568] believes this exhibit which he has prepared and submitted here—whether he believes in the computations which you have made based on this evidence which is to be introduced. Is that your question, then?

Mr. Blanchard: Well, approximately, yes. I did not mean to imply for one minute that Mr. Hoffmann's figures are not correct, as he took them off the reports. I am trying to lay a foundation for some questions from Mr. Henkle when he takes the stand, to show that Mr. Hoffmann's classification of what is delivered and what is not as he has described it here, is incorrect. I think his figures are honest. He has done his very best to take them from the train sheets. They show that.

I do not think he knows what the stock yards company marks "De!" and what they do not.

Exam. Carter: It is hard enough for me to follow this case as it goes along in its normal way. I would prefer if you would even recall Mr. Hoffmann later to bring that point out.

Mr. Blanchard: I will be glad to.

Exam. Carter: I would really prefer to have you do that. I think we will get it much more in order. I admit, that the way this has been going in, you are liable to confuse the Examiner.

Mr. Blanchard: I am not a bit surprised. It would confuse almost anybody. I know Mr. Smith is. I think perhaps sometimes I am, too.

[fol. 569] Mr. Smith: I know that was good, but I did not hear all of it. I was not listening.

Mr. Blanchard: I am not surprised at that, either.

Mr. Smith: However, I do agree with the last part of your statement, Mr. Blanchard. Is that all?

Exam. Carter: Let me ask you this question, Mr. Hoffmann:

By Exam. Carter:

Q. In recent years, generally speaking, have the available facilities, that is, the unloading chutes and unloading platforms of the stock yards company now in use, been sufficient or more than sufficient or less than sufficient to take care of the usual run of shipments now coming into the stock yards?

A. It is sufficient. They have sufficient facilities there to handle the livestock received.

Q. Has there been in the last few years since the number of livestock shipments by rail to the yards has decreased—of course, there may have been at particular times—but, has there usually been a congested condition which required the immediate removal of the stock from the unloading pens?

A. That is correct, Mr. Examiner.

Q. You mean that there has not been any?

A. No, there has not been any.

Q. I am speaking of normal times. There may have been at times, but I mean over a period of months.

A. Over a period of months——

[fol. 570] Mr. Smith: Do you want the question read to you?

The Witness: Yes. Read that question to me again.

Exam. Carter: Read the question, Mr. Reporter.

(Question read.)

A. Yes.

Mr. Smith: The Examiner means by somebody, or by the stock yards company?

Exam. Carter: Well, perhaps I should elaborate on that a little more.

By Exam. Carter:

Q. Has the condition been so congested that it has been necessary in the usual course of business for the stock yards company employees to remove stock from the unloading chutes so as to permit other stock to be loaded into those chutes?

A. Recently.

Q. Within recent years—well, now, I mean, at the present time.

A. There has been a portion that had to be yarded in holding pens, Mr. Examiner.

Q. Is that proportion as great now as it was when the livestock arriving by rail was much greater in volume than at the present time?

A. No.

Exam. Carter: That is all.

Mr. Blanchard: I have one more question.

By Mr. Blanchard:

Q. Mr. Hoffmann, can you state whether or not the stock [fol. 571] yards company has what they call their unloading crew, consisting of men who are particularly trained in getting animals out of the stock cars, including wild bulls, Texas steers and everything else?

A. That is correct. They have a force of men.

Q. They also have what they call their yard crew, whose duty it is to take animals from one point to another after they have been placed or taken to the commission men; they drive them to the scales for weighing, and so forth?

A. They have a crew other than the unloading crew, yes.

Q. Do you know, or can you state whether or not the stock yards company regards these animals as being yarded, unless the yard crew has handled them?

A. I will let Mr. Henkle answer that.

Q. Do you know?

A. No, I do not.

Q. Do you know whether the stock yards records would show a car as taken from the unloading chutes, even

though the unloading crew may have placed it six alleys back from the actual pen in which it was unloaded?

A. The unloading crew?

Q. Yes, in order to make room for unloading another car.

A. I do not get that question at all.

Q. Does the yards company regard the animals as being taken away from the unloading chutes until the unloading [fol. 572] crew handles them, no matter what pens they are in?

A. I think we will let Mr. Henkle determine that. I will not answer that question.

Q. Do you know?

A. No, I do not.

Mr. Blanchard: That is all.

Exam. Carter: That will be all.

Mr. Smith: Is that all, Mr. Rynder?

Mr. Rynder: Yes.

Exam. Carter: You are excused, Mr. Hoffmann.

(Witness excused.)

Mr. Smith: I will recall Mr. Sperry.

Mr. Rynder: Before the next witness begins, I wish to refer to the decision of the Commission in Livestock Loaded and Unloaded at Chicago, 213 ICC 330; commencing at page 332 there is a statement: "Under an agreement with the Junction, the trunk lines entering Chicago were granted trackage rights over the railroad. Operating under trackage rights, trunk lines delivered livestock directly to the platforms of respondents," and a few more things I need not take up your time to read. I would like to ask Mr. Smith if he would make a copy of that agreement from any one of his clients, available to me during the period of this hearing?

Mr. Smith: You want a copy of any trackage agreement——

Mr. Rynder: The one, whatever it was, the Commission [fol. 573] referred to.

Mr. Smith: Tell me what you want me to get.

Mr. Rynder: The agreement.

Mr. Smith: You have said it on the record once, have you not, Mr. Rynder?

Mr. Rynder: Yes; the agreement referred to in the second paragraph, the third line from the top on page 332, volume 231 of the Commission's reports.

Mr. Smith: Just any one of those railroads?

Mr. Rynder: Just any one. I am assuming they are uniform; just any one of them.

Mr. Smith: Of course, if I bring one here does that mean I am assuming they are uniform? I am not going to assume that.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: I will undertake to get one, Mr. Rynder.

Mr. Rynder: Thank you.

Exam. Carter: Call your next witness.

Mr. Smith: Take the stand again, Mr. Sperry.

R. A. Sperry having been previously sworn, resumed the stand and testified further as follows:

Direct examination (Cont'd.)

By Mr. Smith:

Q. Mr. Sperry, you were asked to make a further check [fol. 574] of these tariffs to see whether what you have said about them is correct, is that not so?

A. That is correct.

Q. Have you done that?

A. I have.

Q. Now, you referred to a typical Santa Fe tariff. I think you found that one of the supplements to that tariff which you gave to these gentlemen was not specifically referred to in your testimony, is that right?

A. That statement is correct.

Q. What is that supplement?

A. Supplement No. 19 to A. T. & S. F. ICC 12423.

Q. That was one you handed to counsel, was it not?

A. It was.

Q. Now, specific and particular reference was made to a Milwaukee tariff. Have you communicated with the Milwaukee officials to learn whether or not they make the same interpretation of that tariff you have given here?

Mr. Blanchard: I object to that. The tariff speaks for itself. The Commission are the ones to interpret the tariff.

Mr. Smith: I am perfectly willing to let this thing drop right here.

Mr. Blanchard: It is all right with me. I would like to remind you that the Commission held in the Hygrade case that unless the destination is specifically named, the charge [fol. 575] was the Chicago rate plus the switching charge of the Chicago Junction Railroad, $12 per car.

Mr. Smith: Are there any other questions of Mr. Sperry?

By Mr. Blanchard:

Q. I would like to ask Mr. Sperry if he has made any investigation as to what basis of rates has actually been applied to the shipments delivered at the so-called team track deliveries referred to by Mr. Hoffmann.

A. I have not.

Mr. Blanchard: That is all.

Exam. Carter: Are there any other questions?

Mr. Rynder: I would like to ask one question.

By Mr. Smith:

Q. Do you stand, then, fully upon the statement in your direct testimony that the so-called flat Chicago rate applies under the tariffs you have referred to, to these team track deliveries?

A. I do.

Mr. Smith: That is all.

Exam. Carter: All right, Mr. Rynder.

Mr. Rynder: I want to ask one question.

By Mr. Rynder:

Q. Has there been any change to your knowledge in that condition since December, 1935, or has that condition been in effect?

A. I have not made an examination back that far, so I cannot answer that.

Mr. Smith: Mr. Rynder, I think I can understand what [fol. 576] you are worrying about. Are you wondering why we started that in 1935, that showing on that exhibit?

Mr. Rynder: Not particularly.

Mr. Smith: I thought if you were, I would tell you. I think it would be interesting information for the Commission. I would like to have him tell you.

The Witness: It was started there because I told these people to go back for three years. That is the sole reason. I told them to go back for three years because I thought that gave them a big enough job.

By Mr. Rynder:

Q. Do you know that the tariffs about which you have testified concerning team track deliveries—do you know that they were any different in 1935?

A. I do not know.

Mr. Blanchard: Can you state how far back——

Mr. Rynder: May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Put this on the record.

The Witness: I find that certain of the typical tariffs to which I referred this morning were in effect prior to January 1, 1935.

Mr. Rynder: I see.

The Witness: In fact, many of them were, as far back as 1930, I think.

[fol. 577] By Mr. Smith:

Q. Mr. Sperry, may I ask this: did not your investigation that you made with these individual roads enable you to answer the very question Mr. Rynder has asked, as to whether or not these rates applied on these respective roads to that volume of team track deliveries developed in the last three years?

A. It did, but I think Mr. Rynder referred to my investigation, or examination. I did not personally examine the tariffs for that period of time, but I have been told that that has been the situation. I was trying to conform strictly to Mr. Rynder's question.

By Mr. Rynder:

Q. As far as you know, during that entire period, commencing with the first of 1935, wherever these team track

deliveries were made, they were made at the flat Chicago rate?

A. Yes.

Q. Is that correct?

A. That is my understanding.

Q. With no plus charges?

A. Yes, sir.

Mr. Blanchard: Let us see if we understand each other. I think Mr. Sperry told me he did not know what basis of rates had been applied to the actual shipments Mr. Hoffmann referred to. I think the record will show that. Now, let us go into this a little bit further.

[fol. 578] By Mr. Blanchard:

Q. Can you give us the exact date the addition of the $2.70 to the Chicago flat rate in order to reach the Union Stock yards was removed by order of the Commission, that is, the removal became effective in your tariffs?

A. Yes, sir, if you will wait just a moment.

Exam. Carter: I imagine it was last fall or winter sometime.

The Witness: I think it was a year ago April. Just a minute. I will find it. That was effective April 16, 1937, in compliance with the order in Docket 24847.

Mr. Blanchard: Just a minute, please.

By Mr. Blanchard:

Q. What was that date again, please?

A. April 16, 1937.

Mr. Blanchard: That is all.

Exam. Carter: Are there any other questions?

Mr. Smith: That is all.

Exam. Carter: That will be all, Mr. Sperry. You may be excused.

(Witness excused.)

Exam. Carter: You may call your next witness.

Mr. Smith: I will call Mr. Kemp.

E. L. KEMP was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. State your full name for the record please, Mr. Kemp.
[fol. 579] A. E. L. Kemp.
Q. Where do you reside?
A. My residence is in Highland Park, Illinois.
Q. What is your occupation?
A. Joint agent for the carriers, serving the stock yards, Packingtown, the central manufacturing district, the Chicago Produce Terminal and the Wood Street Potato Terminal.
Q. Just in a very brief way, what are your duties as joint agent at the stock yards?
A. Similar to those of any local freight station for any carrier.

Mr. Smith: I guess that is sufficient.

By Mr. Smith:

Q. How long have you been down there in that capacity?
A. Since August 24, 1918.
Q. You have been at the stock yards every working day since then except for vacations and illness, and that sort of thing?
A. Not enough vacation; but I have been away on several other occasions.
Q. Mr. Kemp, I hand you a document entitled "United States Department of Agriculture, Bureau of Agricultural Economics, Market News Service, Chicago Receipts Direct to Packers, Chicago", which purports to show back as far as the year 1920 the direct shipments of livestock to packers at Chicago. I will call your attention to the fact that [fol. 580] this shows in 1920 there were 792,767 animals consigned directly to the packers received at Union Stock Yards at Chicago. I will ask you whether or not that is in conformity with your recollection of the movement of directs at the U. S. Yards at that time.
A. I would not question the accuracy of that statement.
Q. Do you have an independent recollection, within limits, as to the volume of direct shipments that came into the

Union Stock Yards from the time you went down there until the present time?

A. Yes, sir.

Q. State what the situation was in 1918 as to whether the volume of direct shipments was substantially the same as this.

Mr. Rynder: Substantially the same as what?

The Witness: It was substantially the same as the 1920 figure.

Mr. Rynder: What was that?

Mr. Smith: The figure was 792,787.

Mr. Rynder: 792,787?

Mr. Smith: Yes.

Mr. Rynder: That is head?

Mr. Smith: That is head, yes.

Mr. Rynder: All right.

Mr. Smith: It is not all livestock, by the way. It is cattle, hogs and sheep including calves.

By Mr. Smith:

Q. Now, I am going to read to you, Mr. Kemp, the figures for subsequent years, and ask you if your inde- [fol. 581] pendent knowledge of the subject is substantially in conformity with the information shown here.

Mr. Rynder: Let us get them. Read them slowly, please.

Mr. Smith: Yes. First I will give them to you by species, for 1920, and when I say "cattle", that includes calves. Cattle, 1920, 51,474; hogs, 198,673; sheep, 642,690.

By Mr. Smith:

Q. You have answered as to 1920?

A. Yes.

Q. Now I will read 1921, and then every two years thereafter: 1921, cattle, 41,651; hogs, 264,171; sheep, 811,492. Do you have my question in mind?

A. Yes. Your question was whether that was substantially my recollection. It is substantially my recollection.

Mr. Smith: I will read 1923—I am doing this for the sake of brevity, Mr. Rynder. You can put in the other years if you care to.

Mr. Rynder: Go ahead.

Mr. Smith: 1923: cattle, 43,672; hogs, 419,233; sheep, 543,798.

The Witness: Yes. That is substantially the same.

Mr. Smith: 1925: cattle, 41,170; hogs, 350,116; sheep, 792,645.

The Witness: That is right.

Mr. Smith: 1927: cattle, 52,941; hogs, 519,108; sheep, 734,263.

[fol. 582] The Witness: That is right.

Mr. Rynder: Mr. Examiner, I am not going to object to my friend Mr. Smith putting it in in this way, because I think it is a short cut, but I certainly must say that I marvel at the memory of the witness.

The Witness: No. The witness does not mean to say he remembers all those figures.

Mr. Rynder: What?

The Witness: The witness does not mean that he remembers all of those figures.

Mr. Rynder: No?

The Witness: He remembers that that statement has been before him before and he feels that is accurate all the way through.

Mr. Rynder: That, of course, is no evidence at all, Mr. Examiner. However, just because this is government authority I will let you read them in, although this is a farce we are going through.

Mr. Smith: That is very kind of you.

Mr. Rynder: I think it is a farce.

Mr. Smith: This is not the first time we have wasted here, if it is wasting time.

Exam. Carter: Proceed.

Mr. Smith: 1929: cattle, 105,588; hogs, 2,337,432; sheep, 1,049,609.

[fol. 583] By Mr. Smith:

Q. Is that substantially in accord with your recollection?

A. Yes.

Q. Of the volume of the movement?

A. Yes, sir.

Q. 1931: cattle, 49,153; calves, 53,775; hogs, 2,666,477; sheep, 1,116,070. Is that substantially in accord with your recollection?

A. Yes.

Q. Of the volume of the movement?
A. Yes, sir.
Q. 1933: cattle, 104,872; calves, 884,771; hogs, 3,101,684; sheep, 859,641. Is that substantially in accord with your recollection of the volume of the movement?
A. Yes, sir.

Mr. Rynder: Just a moment. Before he reads you the figures for 1935, please tell me your recollection of the movement for that year.

A. 1935 was a little less than that.

Mr. Smith: We always ask one question to- many, Mr. Rynder. I do the same thing.
Mr. Rynder: I just wanted to see how close the witness would come to estimating the figures.
Mr. Smith: I do not have 1935. By the way, it is not shown on this statement. We have the movement in cars [fol. 584] from that time on.
Exam. Carter: I think the witness is testifying to this: he was shown a certain statement issued by the Department of Agriculture and its identification was made known to him. That statement contains certain figures. Now, Mr. Kemp has said he has previously seen that statement and has compared the figures——
Mr. Rynder: No.
Exam. Carter: Let me finish, please—he has compared the figures on that statement with his recollection.
Mr. Rynder: No. He said he felt it was right.
Exam. Carter: Let me ask him, then. Perhaps I misunderstood him.
Mr. Rynder: No.
Exam. Carter: Let us get this thing str-ight. What did he say?

By Exam. Carter:

Q. Have you previously seen this statement, Mr. Kemp?
A. Yes, sir.

Mr. Smith: He gave it to me.

By Exam. Carter:

Q. Have you done anything to test the accuracy of the figures on that statement with what you believe to be the volume of movement during those years?

A. No, sir. I have not checked those figures.

Q. What makes you say you feel that those figures are accurate?

A. The volume of business that we handle from time to [fol. 585] time direct, as compared with the local—I have had those reports before me to show the volume of the business and how it was running. I have never checked those statements with any of my records to see whether they are accurate or not, but I have always felt they were accurate coming from the government, and that is my recollection of them.

Mr. Smith: It was not my purpose to ask him if they were accurate to the thousand, but whether that general volume of business approximated what his recollection was. Just to make this accurate, I will ask for ten days after the close of this hearing to have true copies made of these statements, and submit them for the record. They are reports of the government.

Mr. Rynder: Mr. Smith, I tried to make it a lot easier than that because I thought we were going through a farce. I said, if Mr. Smith would read those figures stating they are from that report, I will take them right now without going through the farce of having Mr. Kemp try to remember the figures he has there.

Mr. Smith: What is it you are worrying about, Mr. Rynder? I am not clear.

Exam. Carter: The request I have before me is to make copies of this statement to be filed within ten days as an exhibit. Is there any objection?

Mr. Rynder: No. I can short-cut it. If he wants to read them, it is all right with me.

[fol. 586] Exam. Carter: That may be done then, Mr. Smith.

Mr. Smith: If the Examiner please, would it be possible to have the reporter copy it into the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Gentlemen, the reporter informs me that to copy this data into the record would be a very difficult task. It is understood that copies of this statement will be filed as an exhibit within ten days.

Mr. Smith: Very well.

Exam. Carter: We will recess for five minutes.

(Short recess.)

Exam. Carter: Let us resume, gentlemen.

By Mr. Smith:

Q. Mr. Kemp, during your period at the stock yards, have you had frequent, if not daily occasion to see how livestock is handled there?

A. I have had frequent occasion, yes, sir.

Q. You are familiar with the manner of its handling, are you?

A. I think so. I feel so.

Mr. Smith: What is the next exhibit number, please?

Exam. Carter: 28.

Mr. Smith: I will ask to have this next exhibit identified as exhibit 28.

(Defendants' Exhibit No. 28 marked for identification.)

By Mr. Smith:

Q. Mr. Kemp, Mr. Hoffmann testified that he represented [fol. 587] the Western Weighing and Inspection Bureau, which he said was an association of western lines. Do you represent both western and eastern lines?

A. Yes, sir.

Q. Have you had prepared an exhibit which has been identified as No. 28, which is captioned "Statement of Cars of Livestock Received at Union Stock Yards and Omaha Packing Company Consigned to Swift and Company and the Omaha Packing Company over Eastern Lines".

A. Yes, sir.

Q. Are the facts and figures shown thereon true and correct to the best of your knowledge and belief?

A. They are.

Q. The numbers refer to cars, do they not?

A. Yes, they do.

Mr. Smith: I think that is self-explanatory, and I offer it in evidence.

Exam. Carter: Exhibit 28 will be received in evidence.

(Defendants' Exhibit No. 28, Witness Kemp, received in evidence.)

Mr. Smith: Mark this as Defendants' Exhibit 29 for identification, Mr. Reporter.

(Defendants' Exhibit No. 29 marked for identification.)

By Mr. Smith:

Q. I hand you for identification exhibit No. 29 entitled, "Statement of Cars of Livestock Received At Union Stock [fol. 588] Yards Over the Eastern Lines Consigned Directly to Packers Located in Chicago, Illinois, Other Than Complainants".

A. Yes.

Q. I will ask you if you had that exhibit prepared.

A. I did.

Q. And are the facts and figures shown thereon true and correct to the best of your knowledge and belief?

A. They are.

Q. And the numbers refer to carloads, do they not?

A. They do.

Mr. Smith: We offer exhibit No. 29 in evidence, if the Examiner please.

Exam. Carter: Exhibit No. 29 will be received.

(Defendants' Exhibit No. 29, Witness Kemp, received in evidence.)

Mr. Smith: I will ask to have this next document identified as exhibit No. 30.

(Defendants' Exhibit No. 30 marked for identification.)

By Mr. Smith:

Q. I hand you, Mr. Kemp, an exhibit marked for identification as No. 30, which bears the caption, "Statement of Cars of Livestock Received at Union Stock Yards Over Eastern Lines, Consigned to Swift and Company Showing Separately Those Taken by Swift and Company At Unloading Chutes, and Those Taken by Swift and Company From Holding Pens."

A. Yes.

[fol. 589] Q. That is a companion exhibit to the one previously introduced here by Mr. Hoffmann, covering the western lines, is it not?

A. It is.

Q. Are the facts and figures shown hereon true and correct to the best of your knowledge and belief?

A. They are.

Q. Where the consignees take possession of the stock at the unloading chutes, that stock is driven to the commission firms' pens, or to the packers by the employees respectively of the commission firms or the packers, is that so?

A. That is true.

Q. Where the animals are yarded or put in holding pens, as designated on this exhibit, is it true that the animals are put into the holding pens from the unloading chutes by the yard employees?

A. That is true.

Q. Then they are taken from the holding pens by the consignee thereof?

A. That is true.

Q. And driven over to the commission pens, or to the packers' plants?

A. That is true.

Mr. Smith: If the Examiner please, we now offer exhibit 30 in evidence.

Mr. Blanchard: Mr. Smith, would you stipulate in order [fol. 590] to save cross examination, that Mr. Kemp's classification "Taken From Unloading Pens" and "Taken From Holding Pens" is based on the same records, the train sheets identified by Mr. Hoffmann, where the word—or the letters "Del." are shown, that they are shown here as having been taken from the holding pens?

Mr. Smith: I will not make any stipulation with you. Mr. Kemp will be submitted for cross examination. You can ask Mr. Kemp any questions you have in mind.

Mr. Blanchard: All right.

Mr. Smith: Does the record show that exhibit No. 30 was received?

Exam. Carter: I have heard no objection to exhibit No. 30. Exhibit 30 will be received.

(Defendants' Exhibit No. 30, Witness Kemp, received in evidence.)

Mr. Smith: May the record show as a safety measure that all of the exhibits which defendants have offered up to this point have been received?

Exam. Carter: Subject to the objections to the specific exhibits which have been stated, yes.

Mr. Smith: Yes.

Exam. Carter: The record may so show.

Mr. Smith: Mr. Examiner, with reference to this exhibit I might say that there has been so many statements made here that this livestock comes in so many each hour through- [fol. 591] out the day, or something of that sort, I have had this exhibit prepared. I will ask that it be identified as exhibit 31.

(Defendants' Exhibit No. 31 marked for identification.)

By Mr. Smith:

Q. When did I ask you to prepare this exhibit, Mr. Kemp?

A. About 11 o'clock this morning.

Q. And you have had it prepared since that time?

A. Yes, sir.

Q. I asked you to show for a normal week at what time during the day and on what days the stock was delivered?

A. Right.

Q. And you have undertaken to show that on this exhibit?

A. I have.

Q. You told me, did you not, that as a matter of fact, this week that was covered by this exhibit is, you think, one of the heavier weeks of this year?

A. For 1938, all of which have been unusually low.

Q. Yes. The movement during 1938 has been unusually low, has it?

A. Yes, sir.

Q. That is, unusually low comparatively, with what?

A. Former years.

Q. With former years?

A. Yes.

Q. Now, what is your judgment, from your experience, [fol. 592] as to weeks when the movement is heavier, the movement would be spread approximately as this movement is spread?

A. I do not think there would be any material difference, only the volume would be greater.

By Mr. Blanchard:

Q. For all periods, do you mean?

A. Yes.

By Mr. Smith:

Q. In your judgment are the facts and figures shown here true and correct?

A. I believe it is a true picture.

Mr. Smith: We offer in evidence Defendants' Exhibit No. 31.

Mr. Rynder: No objection.

Exam. Carter: Exhibit 31 will be received in evidence.

(Defendants' Exhibit No. 31, Witness Kemp, received in evidence.)

Mr. Rynder: I have an idea, however, that the percentage is marked wrong there.

Mr. Smith: Do you think some of those figures are wrong?

Mr. Rynder: No. I take it for the highest period the .7480 means 74 per cent.

The Witness: That means pretty nearly 75 per cent.

Exam. Carter: 74.8 per cent.

Mr. Rynder: As I read it there, he has .74 of one per cent.

The Witness: The decimal point is in the wrong place.

Mr. Rynder: The decimal points are out of place.

[fol. 593] Mr. Smith: Oh, yes.

Exam. Carter: Let us take the grand total. The first figure there should be 5.15 per cent?

The Witness: That is right.

Exam. Carter: The second percentage should be 74.8?

The Witness: That is right.

Exam. Carter: The third percentage, 5.22?

The Witness: That is right.

Exam. Carter: The fourth percentage should be 8.15 per cent?

The Witness: That is right.

Exam. Carter: The fifth percentage should be 6.68 per cent?

The Witness: That is right.

Mr. Smith: Would you like to have a further statement made there, Mr. Rynder, or is that sufficiently clear now as to what he means?

Mr. Rynder: No.

By Mr. Smith:

Q. Go over to the per cent column under 3 A. M. to 8 A. M., where the figure .5949 appears. Does that mean 59.49 per cent?

A. For Sunday?
Q. Yes.
A. That is right.
Q. That is typical of the error that has been made in the [fol. 594] placement of the decimal point, is it?
A. The decimal point should be placed between the 9 and the 4, instead in front of the 9.
Mr. Rynder: You mean instead of in front of the 5.
Exam. Carter: Instead of in front of the 5.
The Witness: That is 59.49 per cent. The decimal point should be between the 9 and the 4.

By Mr. Smith:

Q. That is typical of the whole situation?
A. The whole column.

Mr. Smith: I will ask to have this next document identified as Defendants' Exhibit No. 32.

(Defendants' Exhibit No. 32 marked for identification.)

[fol. 595] By Mr. Smith:

Q. Mr. Kemp, I call your attention to exhibit 32 for identification, entitled "Direct shipment of livestock received by Swift and Company for the years 1935-1936-1937 and the first four months of 1938 showing also approximate time of unloading and time taken by Swift and Company either at unloading chutes, holding pens or docks."
A. Yes.
Q. I will ask you whether that exhibit was prepared at your direction.
A. It was.
Q. In response to my request?
A. At your request it was.

Mr. Rynder: Did you prepare it—it was not prepared from documents in your possession, was it?
Mr. Smith: I am going to cover that if you will let me do it, Mr. Rynder.
Mr. Rynder: All right.

By Mr. Smith:

Q. Certain of the information appearing on this exhibit is taken from records that are part of the official records of your office, is that not so?

A. They are taken from records that are part of the official records of my office.

Q. What items on this exhibit are taken from the records of your own office?

A. Refer to page 1 as an illustration: the date, road, car, [fol. 596] contents, train, time in and out, count, chute pens, and holding pen where yarded.

Q. That much appears in your records?

A. That was taken from my records.

Q. Now, there are certain time items shown in this exhibit that do not appear in the records in your office.

A. That is right.

Q. Is that correct?

A. That is right.

Q. Did you arrange with Mr. Henkle to obtain the time items that have now been incorporated in this exhibit with reference to each of these cars covered?

A. I did, at your request.

Q. Were the time items that you have referred to entered on these statements which have been reproduced here by the employees of the stock yards?

A. They were.

Q. Did you cause a check to be made of various items to satisfy yourself as to whether or not the transcription of the time items had been properly made?

A. I detailed an employee to make a check, periodically, out of all items.

Q. Will you state whether the facts and figures shown here are true and correct to the best of your knowledge and belief.

A. They are.

[fol. 597] Q. Now, will you turn to page 1, please, and to the first column on page 1—strike that. Does this exhibit show the information which it purports to show with reference to every car of livestock consigned directly to Swift and Company at the Omaha Union Stock Yards?

A. No, sir.

Q. I mean, the Chicago Union Stock Yards?

A. The Chicago Union Stock Yards?

Q. Yes.

A. Yes, sir.

Q. During the period covered by the caption of the exhibit?

A. Yes, sir.

Q. It shows by these various items the handling of each of those cars, does it?

A. It does.

Q. Now, will you turn to the first column on page 1. You show under the word "Date" a number of dates in the form of numerals do you not?

A. Yes. January 1, 1935, was the first item.

Q. What does that mean, when January 1, 1935, is shown?

A. It means that car was unloaded on January 1, 1935; it was placed for unloading at the platform and unloaded.

Q. By "Car", you mean the car shown opposite that date, namely, 18155?

A. That is right.

[fol. 598] Q. Underneath the word "Road" you show a number of symbols.

A. Yes.

Q. Are those the symbols of the line haul carriers of those cars?

A. That simply indicates the road that placed that particular car at the unloading chutes.

Q. You have used the abbreviations for those roads?

A. Yes.

Q. "CNW" means the Chicago and North Western Railway?

A. Yes.

Q. "StP" means what?

A. Chicago, Milwaukee, St. Paul & Pacific Railroad.

Q. And the other initials shown on the exhibit are the familiar initials of the various roads, are they not?

A. That is right.

Q. Next you show under "Contents" the species of livestock in the car?

A. That is right.

Q. Then the next item is headed "Train". What is it that you show under the heading "Train"?

A. The train number and platform number.

Q. What is the train number?

A. Train No. 1, platform No. 3.

Q. You show the train number first and the platform number appears thereafter?

[fol. 599] A. That is right.

Q. What platform number is it that is shown there?

A. On the first item it is train No. 1 and platform No. 3.

Q. Do those numbers of the platform designate the respective platforms that are shown on exhibit 1?

A. That is right.

Q. Numbered from 1 to 10.

A. That is right.

Q. The next two items are shown under the caption of "Time unloaded into chute pens"; then immediately beneath that appears "Train"; then beneath that appears "In" and "Out". Do you have the exact time when a particular shipment is unloaded into the pens or do you only have the time when the train is set and the time when the train goes out?

A. The only information I have is the time the cars are spotted at the chute, and the time the train is pulled out from the chute.

Q. Does the designation "In" refer to the time when the train is spotted at the chute?

A. That is right.

Q. And the designation "Out" refers to the time when it is pulled out?

A. That is right.

Q. Necessarily the unloading of the cars occurred between those times and in that interval?

[fol. 600] A. Between 7:15 P. M. and 7:50 P. M.

Q. Yes. The next heading is "Count". What does that refer to?

A. That refers to the number of animals unloaded from that car by the Union Stock Yard and Transit Company.

Q. The next item covers "Chute Pens". Two numbers are given under some and one under others. Explain those columns, please.

A. When it was necessary to use more than one pen, two or more pens are shown. I think in almost every instance it is only two.

Q. Sometimes one is shown only?

A. It is possible to load that number of animals into one chute pen.

Q. The next caption is "Time taken from chutes." The first item appearing there relates to the second car shown on the page, namely 64874, and the times taken from chutes are indicated as "855A to 900A". What does that mean?

A. That means it took from 8:55 A. M. to 9 A. M. to make delivery of those two cars, for Swift and Company to take those two cars from that chute pen.

Q. Is that an instance where the animals were taken from the chutes into which they had been unloaded by the employees of Swift and Company?

A. Yes.

Q. Going over to the next column "Holding Pen where yarded", what does the figure 659 refer to?

[fol. 601] A. That means that the yard company yarded the contents of chutes 80 and 79 into holding pen 659AM.

Mr. Rynder: What was that?

The Witness: 659—no, that is holding pen 659.

Mr. Smith: Read the witness' answer please, Mr. Reporter, and see if he got that straight.

(Answer read.)

The Witness: I should have said that was holding pen No. 659.

By Mr. Smith:

Q. Now, going to the last column, what does "900A" stand for under the caption "Time taken from other than chute pens"?

A. That means the time Swift and Company took those hogs from the holding pen.

Q. From holding pen 659?

A. 659.

Q. For movement through the yards down to their plant?

A. Yes, sir.

Q. I notice the last item on the page shows no time reported. The records that you have testified about simply do not record the time of that shipment?

A. We are unable to obtain the time.

Q. That same condition existed with reference to several shipments at the top of page 3, did it?

A. Yes, sir; all through the reports you will find the same [fol. 602] thing. You will find some.

Q. Now, Mr. Kemp, is there any other particular item or items here that would not be covered by this detailed explanation that has been made? I think there are some handlings to docks, are there not, somewhere.

A. Yes. On page 49, for instance, you will find pen items there. You will notice that some of the shipments were delivered from other than holding pens. For instance, it says, "No. 5 Dock South Exchange Avenue", and "Block

No. 1-D". That means the animals were taken by Swift at that point, instead of being yarded into holding pens.

Mr. Rynder: Just while we are on that, let me ask you a question.

By Mr. Rynder:

Q. Do you know where that was?

A. Dock 5—they explained that this morning there on the map. Dock 5 is where you drive them from the yards over to your plant near South Exchange Avenue, right there near your sheep house. You take possession of them there. Block No. 1 in division D is on that map there. I do not know just what part of—I do not know where Block No. 1 is, but it is in division D on the map, and would be easily located.

By Mr. Smith:

Q. Are there any other items that ought to have a special explanation here that you have in mind, Mr. Kemp?

A. Well, that is all. They are all similar to that. On page 89 you have "Dock No. 6 Exchange Avenue 7:30 A. M.", and through the exhibit you will find the exact places that Swift and Company took possession of these animals. [fol. 603] Q. And the time at which they took possession of them?

A. That is right.

Q. Was the detailed explanation you gave with reference to item 1 typical of the way the entire exhibit has been made up in the matter of form?

A. That is right.

Q. And the first several pages that precede the rest constitute a re-cap of the information shown on the following pages?

A. Yes. The first page is a summary, and the second page—the second and third pages are a re-cap by years and by months.

Mr. Smith: Mr. Thomas tells me that some of these exhibits seem to lack this summary. Off the record.

(Discussion outside the record.)

Exam. Carter: Now back on the record.

Mr. Smith: I offer this exhibit in evidence, if the Examiner please.

Exam. Carter: Is there any objection?

Mr. Rynder: No. There is no objection to the exhibit.

Exam. Carter: Exhibit 32 will be received in evidence.

(Defendants' Exhibit No. 32, Witness Kemp, received in evidence.)

Mr. Smith: That is all.

Exam. Carter: You may cross-examine.

[fol. 604] Mr. Blanchard: I have just a question or two. Mr. Kemp, your exhibits——

The Witness: You will have to come over here where I can face the Examiner and listen to you, too.

Mr. Blanchard: All right.

Cross-examination.

By Mr. Blanchard:

Q. Your exhibits 28, 29 and 30, which divide the receipts into two classifications, namely "Taken at unloading chutes", and "Taken from holding pens"——

A. Yes.

Q. From what source did you determine that classification?

A. From the same source I obtained exhibit No. 32.

Q. That is the same source that Mr. Hoffmann got his information from as to the western lines?

A. Sure.

Q. All those exhibits purport to be is a faithful reproduction of the entries which are marked "Del." on the stock yards company's reports to you and those which are marked otherwise?

A. It is supposed to be a faithful picture of just what occurred in every instance to which the report refers.

Q. But the information from which you based that was given to you by the stock yards company, was it not?

A. Well, the information from which I obtained this—or, I obtained this information from a joint record that is started by the stock yards company and finished by me.

[fol. 605] Q. That is right.

A. So it is not altogether the stock yards Company's. It is a joint record we maintain.

Q. But you testified that the time of removal either from the chutes or the holding pens was given to you by the stock yards company.

A. That is right.

Q. And you have no record of your own kept under your supervision from which that information could be obtained?

A. That is true. That is what I testified to.

Q. So in that respect and also in the respect of whether they are taken from chute pens or taken from yarding pens, you are simply here reflecting what the stock yards company reports to you?

A. That is right.

Q. And whatever was their dividing line between these two classifications was your dividing line?

A. That is right. I checked it to see it was accurate.

Q. I am not questioning the accuracy of what you reflect here.

A. No.

Q. Your exhibit No. 31, you stated you believe was a fair picture of the average week concerning the time of arrival at the stock yards. That is, that is the time the trains arrive, is it not?

A. Yes. That is the time the trains arrive, but I was [fol. 606] testifying there that I thought it was fair because of the question as to whether this was a representative period.

Q. Yes.

A. This is an accurate statement of fact. What I was trying to do was to say that was not only true for a week in January, 1938, but it was also true in the same proportion in 1935.

Q. Yes.

A. Only the volume was heavier.

Q. The volume in each one of these classifications was heavier?

A. Yes.

Q. But heavier in the same proportion.

A. That is right.

Q. Is it possible to compute from this exhibit and divide the total arrivals that week between those which arrived from 6 P. M. at night until 8 P. M. the next morning and those which arrived from 8 P. M. that morning until 6 P. M. the following night?

A. You mean, from 6 P. M. to 8 A. M. and from 8 A. M. to 6 P. M.?

Q. Yes; in other words, divide your day at 6 P. M. instead of midnight.

A. I can divide that between 6 P. M. and 8 A. M. and from 8 A. M. to 6. P. M., but I do not want to do it myself.

Q. Can we not do it right here?

A. I would rather have somebody else do the figuring.

[fol. 607] Q. If we take those arriving from 8 A. M. to noon, and those arriving from noon to 6 P. M., we would add together 217 and 139.

A. Yes. All you have to do is add.

Q. That would be 356 cars, would it not, if you add those two figures?

A. Ask that question again.

Q. If we want to find out those that arrived between 8 in the morning and 6 o'clock at night, of the same day, we would simply add 139 and 217, which if my mathematics are correct makes 356 cars.

A. Yes. I am glad your mathematics are good.

Q. That means that 356 cars of the 2,663 cars that arrived that week, arrived after 8 o'clock in the morning and before 6 o'clock in the evening?

A. What are you going to do with the 178 here?

Q. That is after 6 P. M. in the evening.

A. You just added these two, and then subtracted from that?

Q. The sum of these two would arrive from 8 A. M. in the morning until 6 P. M. in the evening, is that not correct?

A. That is right.

Q. To get what arrived from 6 P. M. in the evening until 8 o'clock the next morning, you would have to add 178, 137 and 1,992?

A. Yes.

Q. I understand the exhibit now.

[fol. 608] A. All right. That is fine.

Q. Would you also say that that was a fairly representative showing or representative week as to the arrivals of the days of the week? That is, you ordinarily had about this proportion of Sunday arrivals, this proportion of Monday arrivals, and so forth?

A. Let me think on that question for a moment.

Q. All right.

A. It is at the present time, yes.

Q. Then, is there any slaughtering done out at the yards after noon on Saturday that you know of at the present time?

A. I am unable to answer that question. I do not know what the packers do after noon.

Q. Can we compute from that exhibit on that week how many cars of livestock arrived after Saturday noon of this week and up to the opening of business at 6 o'clock Monday morning?

A. No, because we do not have Sunday's arrivals there.

Q. What is that first line?

A. The other Sunday; the Sunday before.

Q. Can you supply the Sunday arrivals following this Saturday?

A. Yes, I can, if you want me to.

Q. Or the Saturday preceding the Sunday, whichever would be most convenient.

A. I can do either one.

Q. You have seen these unloading chutes, have you not, Mr. Kemp?

[fol. 609] A. A good many times.

Q. Is there any facility in there to water the animals, or do you have to drive them into the chute pens or some holding pens?

A. Well, the chute pens serving platforms 1, 2, 3 and 4 are equipped with sprinkling facilities.

Q. Those are not troughs for drinking water?

A. No, but there are no troughs for drinking in any of the chute pens. There are troughs for drinking in all of the holding pens with the exception of 17.

Q. That is right. So, if any carload of animals arrived at the Union Stock Yards that was running right close to the 28 or 36 hour law, as the case might be, the carrier would have to get them out of those chute pens and get them some place to water them, would they not?

A. I do not know that they would. Our duty is through when we unload them in chute pens. I do not know why we should take it upon ourselves to do it.

Q. Whether they are there or not?

A. No. That is their business, if we get them there within 36 hours.

Q. If the stock yards company wished to give proper care to the animals and knew that a car was running close to 35 or 36 hours they would take them out of those pens for the purpose of watering them, and put them in some pens which were equipped for that purpose, would they not?

[fol. 610] A. I could not say what they would do. I could not say what they would be able to do. All I can say is what they have shown and what is before me.

Q. Take that 116 cars that arrived on Sunday. Do you think they were left in holding pens until the consignee came for them Monday morning?

A. I do not want to talk about that.

Exam. Carter: He has not said any of them were, Mr. Blanchard.

The Witness: I do not want to talk about that.

Mr. Blanchard: He has an exhibit No. 30 here, which is a showing of what was taken from the holding pens and what was taken from the unloading pens.

Exam. Carter: Yes.

Mr. Blanchard: I am simply trying to have him apply this to the arrivals on Sunday.

By Mr. Blanchard:

Q. Do you not know generally, Mr. Kemp, that these animals that arrive after Saturday noon at the stock yards are always taken back to holding pens and never left in the chute pens over Sunday?

A. No, I do not know that.

Q. Did you see any of those chute pens there in that same locality for shipping hogs eastbound?

A. Yes.

Q. Can you very well use the same chute pens for holding [fol. 611] a car that is waiting—or rather, holding a load waiting the arrival of an empty car, and also for unloading another car, in the same pen?

A. You can use the companion chute pen.

Q. I asked you if you could use the same chute pen.

A. Obviously not.

Q. If a chute pen is occupied by a carload of hogs waiting loading, that pen is not available for loading livestock, is it?

A. No, but its companion pen is.

Q. All right. If both companion pens to the chute are occupied with hogs waiting loading, you cannot use those pens for unloading livestock into that, can you?

A. No. You have to move one or both of them.

Q. Is Sunday a relatively heavy shipping day for livestock?

A. They seldom ever ship any stock on Sunday.

Q. What are the heavy shipping days for livestock from the stock yards?

A. Mondays, Wednesdays and Thursdays.

Exam. Carter: This is from the stock yards.

By Mr. Blanchard:

Q. They use the same pens for moving outbound shipments?

A. It is Mondays, Wednesdays and Thursdays, generally.

Q. Could you give us any idea of how many cars in this average week you were shipping out of those same chute pens in which these animals were unloaded, during that week?

[fol. 612] A. That probably would be about 40 per cent of the receipts; near that.

Q. Out of the same chute pens?

A. They must be out of the same chute pens.

Q. Would it then be fair to assume that if you have 300 chute pens you would divide the use of those chute pens for shipment and receipt in the ratio of 40 to 100 in order to find out how much of those pens were available for the receipt of livestock inbound?

A. Yes.

Mr. Smith: Mr. Examiner, I think I have been a pretty patient fellow, but I think this is going a little bit far afield.

Mr. Blanchard: I confess I am wondering about this. I am trying to reconcile Mr. Kemp's testimony with that of Mr. Hoffmann, where 79 per cent of these animals he seems to think were left right in the pens into which they were unloaded, just left there until somebody came and called for them. I am trying to find out how 300 pens can possibly be used in that way, when they are used for both the shipping and receiving of livestock. I think Mr. Kemp knows.

Exam. Carter: Have you much more cross examination?

Mr. Blanchard: That is all I have.

Mr. Rynder: Mr. Examiner, I have no cross examination. I did not object to this exhibit when it was offered. I sup-

[fol. 613] posed you would accept it. I merely want to remark, though, in connection with it, that according to my theory of the case it is utterly immaterial for reasons I have stated earlier today, what time cars go into the pens and what time they go out. Whether they were taken to chute pens or otherwise, the carriers have assessed us this 45 cent

charge on cattle and 15 cent charge on livestock for unloading them into those pens, and have continuously refused us direct access, direct egress from the pens, and indicated by the letters I have read to you earlier today in connection with another exhibit. In other words, as soon as they go into a pen alley, whether under our control or another man's control, we could not get them out without the assessment of that yardage charge.

Mr. Smith: Mr. Kemp, I have one further question.

By Mr. Smith:

Q. Wherever on the exhibit the time item is shown under the caption "Time taken from chutes", does that mean that the animals were actually taken from the unloading chutes into which they were unloaded by the packers?

A. That is what it means.

Mr. Smith: That is all.

Exam. Carter: Are there any other questions?

(No response.)

Exam. Carter: You may be excused, Mr. Kemp.

(Witness excused.)

Exam. Carter: Are there any other witnesses, Mr. Smith, [fol. 614] exclusive of Mr. Henkel?

Mr. Smith: No. I have some documents to offer which I have been carrying back and forth every day. They are rather heavy. I would be glad to offer those. It will only take a moment or two.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will now adjourn until tomorrow morning at 9:30.

(Whereupon, at 3:55 P. M. Central Standard Time, June 3, 1938, adjourned until 8:30 A. M. Central Standard Time, June 4, 1938.)

[fols. 615-616] Chicago, Illinois, June 4, 1938.
8:30 a. m. Central Standard Time.

Before Paul O. Carter, Examiner, Interstate Commerce Commission

Hearing resumed pursuant to adjournment.

Appearances: As heretofore noted.

Proceedings

Exam. Carter: Come to order, gentlemen.

Mr. Smith: I would like to recall Mr. Kemp for a moment, please.

E. L. KEMP, recalled, previously sworn and further testified as follows:

Direct examination.

By Mr. Smith:

Q. You are the same Mr. E. L. Kemp who was sworn yesterday, and testified?

A. Yes, sir.

Mr. Smith: I might say, Mr. Examiner, that Mr. Kemp has advised me he thought that I, or some one had made a statement with reference to the handling of sheep which was not in accordance with the facts.

By Mr. Smith:

Q. I want you, Mr. Kemp, to state what the fact is with respect to the handling of sheep as to whether or not they are always yarded by the stock yards employes, or whether there are instances in which the sheep are taken possession of at the unloading chutes, both by commission firms, and [fol. 617] by the packers?

A. The general practice is as stated, for the stock yards company to yard all sheep. There are, however, exceptions to that practice. In some instances the packers are permitted to accept, or to take the sheep from the unloading pens, and in some instances the commission firms are likewise permitted to do that.

Q. Can you give us—I am sorry. Go ahead.

A. The practice, however, has become more general toward the exclusive yarding, as the years have gone by. 1938 is tighter than it was previous to that time.

Q. What percentage, approximately, of sheep are yarded by the stock yards employes?

A. For the period I have studied, for 1935, there seems to be practically 90 per cent of the sheep that have been yarded. About 10 per cent have been accepted at the unloading chutes. I thought we had better clear that up, in order to have a statement of the facts in connection with it.

Mr. Smith: That is all.

Mr. Rynder: No questions.

Exam. Carter: You may be excused, Mr. Kemp.

(Witness excused.)

Mr. Smith: I want to recall Mr. Hoffmann for a moment.

F. F. Hoffmann, recalled, previously sworn and further testified as follows:

[fol. 618] Direct examination.

By Mr. Smith:

Q. You are the same Mr. Hoffmann, who has previously been sworn and testified in this case?

A. Yes, sir.

Q. Mr. Hoffmann, you testified here that night before last, on Thursday, you went down to the yards, and you testified with reference to Transit Avenue being closed. Did you also take some pictures that night?

A. Yes, sir, I did.

Q. Did you take the pictures, or were they taken at your direction, in your presence?

A. They were taken at my direction in my presence.

Mr. Smith: I will ask that these two pictures be given identification markings.

Exam. Carter: They will be marked as exhibits 33 and 34.

(Defendants' Exhibits Nos. 33 and 34 marked for identification.)

Mr. Smith: I will have copies of these made, Mr. Examiner.

Exam. Carter: Do you want copies, Mr. Rynder?

Mr. Rynder: After I have seen them, perhaps I will waive copies.

Mr. Smith: Take a look at them. May we put them up here where the Examiner can see them as the witness testifies about them?

[fol. 619] Exam. Carter: Yes.

Mr. Smith: Look up here, Mr. Hoffmann, if you will.

The Witness: All right.

By Mr. Smith:

Q. I call your attention to the exhibit which has been marked for identification as No. 34.

A. Yes.

Q. I will ask you whether as one looks into the picture and west, there is in the middle foreground a gate, and what that is?

A. That is the gate of the alley at the extreme west end of platform No. 3.

Q. The picture seems to indicate there are tracks on either side of that gate, is that so?

A. That is correct.

Q. Which is the south side of the picture, where the little house is?

A. This is south (indicating).

Q. No. We cannot get it that way.

A. I see.

Q. Is it where the little house is?

A. Where *is* the little house is, is the south side of the picture.

Q. How many tracks are there on the south side of that little house?

A. Six.

Q. How many north?

[fol. 620] A. Four.

Q. So the entranceway, if one were made into that gate, would be out there between that group of tracks?

A. It would.

Q. Now, refer to exhibit 33 for identification, Mr. Hoffmann.

A. Yes.

Q. I will ask you if on the left hand side of that picture the little narrow white space between the tracks shown

there, is this space running alongside of the little house in exhibit 34?

A. It is.

Q. In other words, if the picture is held in that position with exhibit 34 put at the left end of exhibit No. 33——

A. That is correct.

Q. —that will show the entranceway down between those groups of tracks, will it not?

A. It will.

Q. Does this correctly depict the layout there on the ground?

A. As to Packers Avenue.

Q. As to what it purports to show?

A. Yes, sir, it does.

Mr. Smith: That is all.

Exam. Carter: Is there any cross-examination?

Mr. Rynder: I have one or two questions.

Cross-examination.

By Mr. Rynder:

Q. Mr. Hoffman, I call your attention to exhibit 33. The [fol. 621] main street that seems to run from the property on into the picture is what street?

A. Packers Avenue.

Q. And the tracks that cross Packers Avenue from east to west, or vice versa are continuations of the tracks that were shown upon exhibit No. 34?

A. They are.

Q. Now, I again call your attention to exhibit 33; I ask you if truck and other traffic does not pass continuously over the tracks that cross Packers' Avenue shown on exhibit No. 33?

A. Yes, during the day.

Q. During the day?

A. Yes.

Mr. Smith: They cannot pass continuously, if as he testified yesterday it is closed at night.

The Witness: I said, during the day, Mr. Smith.

Mr. Smith: I understood you.

By Mr. Rynder:

Q. What I mean to say is that at times there may be trains crossing which would cause the trucks to stop on one side or the other?

A. Yes.

Q. But aside from that it is commonly used for passengers and trucks?

A. During the day.

Q. During the day?

A. Yes.

[fol. 622] Mr. Rynder: That is all. Mr. Smith, I would not want to bother you for copies of those exhibits, except that it might be at some future time, I should have need for a complete record in this case.

Mr. Smith: Yes.

Mr. Rynder: So, if it is not too much trouble, I shall be glad to have them.

Mr. Smith: Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Rynder: Just one more question of Mr. Hoffmann.

By Mr. Rynder:

Q. I call your attention to exhibit 34; somewhat in the center and to the rear of the little house there appears to be a gate. Is that a gate at the end of the unloading platforms of the Union Stock Yard and Transit Company at the west end?

A. That is the gate at the extreme end of the alley, west of the alley of platform 3.

Q. That is the gate at the west end of platform No. 3 as indicated on exhibit 1?

A. That is correct.

Q. Coming westerly from the gate indicated on exhibit No. 34, is there any other gate between the one mentioned and Packers Avenue, enroute to the unloading facilities [fol. 623] indicated on exhibit 20 by the numeral 53?

A. There is a gate at the extreme west end of platform No. 1.

Q. That again is an outlet of the stock yards property?

A. It is, but it would be necessary to cross the switch tracks that are adjacent to platform No. 3, the alleyway of platform No. 3, which is used——

Q. Just a minute. I am asking about gates. You say there is a gate at the end of platform 3, at the west end of platform 3?

A. Yes.

Q. Is there another gate at the west end of platform 1?

A. Right.

Q. Then, if we are proceeding westerly to Packers Avenue and southerly to the point marked 53 on exhibit 20, is there another gate?

A. There are gates at platforms 5 and 7 as well.

Mr. Smith: Do not volunteer, Mr. Hoffmann. Just answer the questions. He did not ask you about that.

Mr. Rynder: I did not ask you about that.

By Mr. Rynder:

Q. I am asking if there is another gate beyond the stock yards gate at the end of platform 1, and at the end of platform 3, if you were driving or otherwise moving live stock westerly to Packers Avenue, then south to a point marked 53.

A. I know of no other gate than those at the end of plat-
[fol. 624] form 3 and platform 1.

Q. So, the horse that you were speaking of yesterday at Transit Avenue, would not prevent egress through the gates of the stock yards company at the western ends of platforms 1 and 3 to Packers Avenue and south to the point marked 54 at any time, night or day?

A. No.

Mr. Rynder: That is all.

Exam. Carter: Are there any other questions?

(No response.)

Exam. Carter: That will be all, Mr. Hoffmann.

(Witness excused.)

Mr. Rynder: Mr. Reneker says he has a figure he wants to read into the record.

Mr. Reneker: Mr. Smith asked yesterday for the percentage of directs slaughtered in our Chicago slaughter for the year 1936. That figure is 43 per cent.

Mr. Smith: Is that the way the others were given?

Mr. Reneker: That is the same as all of the others were given to you.

Mr. Smith: In other words, 43 per cent for 1936 compares with 78 per cent for 1937. Mr. Reporter, read back what Mr. Reneker said.

(Record read as above recorded.)

Mr. Smith: You slaughtered all of the directs that came [fol. 625] in. I do not think that is just the way you want that.

Mr. Reneker: That is the way I gave all of those figures yesterday, Mr. Smith.

Mr. Smith: Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: Of the total slaughter by Swift in 1936, 43 per cent were direct shipments?

Mr. Hoffmann: That is right.

Mr. Smith: Has Mr. Henkle come in?

Mr. Henkle: I just arrived direct from the train.

Mr. Smith: Take the stand, please, Mr. Henkle.

O. T. HENKLE, was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. State your full name, please.

A. O. T. Henkle.

Q. Where do you live?

A. Chicago.

Q. What is your occupation?

A. I am Vice-President and General Manager of the Union Stock Yard and Transit Company.

Q. You have direction of the operation of the property, have you not?

[fol. 626] A. Yes, sir.

Q. How long have you been with the company?

A. 35 years.

Q. In what capacity?

A. As general manager since 1912; as vice-president and general manager since 1932.

Q. Some question was raised here yesterday, as to whether or not the stock yards holds itself out to drive shipments of live stock to the yards from the unloading chutes to the sales pens of the commission firms, or the packing houses, in the case of directs.

Mr. Rynder: I object to that question.

Exam. Carter: The question has not been completed.

Mr. Rynder: I want to object to it when it is finished.

Mr. Smith: I did not hear you. What is your trouble?

Exam. Carter: He said he objected.

Mr. Rynder: You had not finished your question. I was going to offer an objection.

By Mr. Smith:

Q. In docket I. & S. 4296 before the Interstate Commerce Commission, this question was asked by Examiner Carter, and the following statement made in response thereto by Mr. Heinemann—I am going to read you the question and Mr. Heinemann's answer, and ask you if you would make the same answer; I will pause after I have finished so Mr. Rynder can make his objection—first, who is Mr. Heinemann?

[fol. 627] A. Mr. Heinemann is our—was at that time our traffic adviser, and my general assistant.

Q. The question by Examiner Carter is this: "Now, I just want this additional question at this point: then, is this true generally speaking, with the exceptions that you have noted, that live stock unloaded at the unloading chutes is ordinarily driven by employes of the commission firms or by employes of the packers through the yards to arise" —the Examiner may have said "arrive", and I interpolate there—"either at the commission firms' pens or at the pens at which their live stock is to be taken, is that correct?"

"A. Yes, sir, that is true. Perhaps I might state it in another way and say that the stock yards company does not hold itself out to remove this stock from either the chute pens, or the holding pens to the market division pens or

the packers' slaughter pens, or the pens adjacent thereto." State whether that is correct, and make any comments upon it which you care to.

Mr. Rynder: The objection I was about to offer to that question, Mr. Examiner, is that the lawful duty assumed by the stock yards company is stated in its tariff which is in evidence as exhibit 3, and that those duties and services and so forth cannot be changed with oral testimony.

Exam. Carter: I will overrule the objection. You may note an exception to that ruling. You may answer, Mr. Henkle.

[fol. 628] The Witness: Mr. Heinemann's statement was correct.

By Mr. Smith:

Q. Is it true, Mr. Henkle, or not, that throughout the years the Union Stock Yards has been in operation it has collected yardage charges on all animals that set foot in the union stock yards, and at all times, it has retained for itself the amounts so collected?

A. That is correct.

Q. Is it true that throughout all of those years, yardage charges have been imposed both on direct shipments to the packers of which possession is taken by the packers at the unloading chutes, and also upon all shipments consigned to commission firms of which possession is likewise taken at the unloading pens?

A. That is correct.

Q. And all such sums have been retained by the stock yards company?

A. Yes, sir.

Q. It is of record in this proceeding that as far back as 1920, back to which date we have records of the Bureau of Animal Industry, or the Department of Agriculture—that back as far as 1920, there were some 800,000 head of live stock brought into the union stock yards at Chicago as direct shipments, consigned to packers. Now, can you give us some idea as to the volume of direct shipments to packers prior to 1920 as to whether or not it was a shipment of substantial volume?

[fol. 629] A. Without referring to the record, which would speak for itself, it is my impression there were not many directs prior to 1920.

Q. What record do you refer to, Mr. Henkle? Can you produce that record so we will have that?

Mr. Rynder: I thought Mr. Henkle meant without referring to this record.

The Witness: No. I mean, by referring to the records.

Mr. Rynder: Of the stock yards?

The Witness: Of the receipts. I cannot state those figures from memory.

Mr. Smith: No. I would not expect you to.

The Witness: I can undertake to give you a statement of such figures as we have bearing on that.

By Mr. Smith:

Q. You do have figures, do you not?

A. I am quite sure we will have it right from the time there was any considerable number.

Q. So far as you know, were there some directs as long as the yards has been in operation?

A. That is a long time. That is more than 70 years.

Q. I appreciate fully how long a time it is. Answer the question, please.

A. Repeat the question.

Mr. Smith: Read the question.

[fol. 630] (Question read.)

Mr. Smith: I am trying to see whether we need the records or whether we do not.

The Witness: I imagine that there might be.

Mr. Rynder: I am perfectly willing to take Mr. Henkle's word for it since the time he has any knowledge about it. I assume he could not very well, without going into very ancient records, determine that back to 1865.

Mr. Smith: Let us see what we can elicit from the witness.

By Mr. Smith:

Q. What do you know about it, from the time you have been connected with the company, since 1912?

A. Up to around 1913 or 1914—prior to that time, and since I have been with the yards, there were probably some shipments direct, but they were not of any considerable extent and would be rather out of the ordinary.

Q. Well, now, in 1920, if there were something like 800,000 head—approximately that—what, in your opinion would be the comparable number in 1912, if you know?

A. I do not know.

Q. Will you produce here a statement showing the number of direct shipments of live stock consigned to the packers in every year since the organization of the Union Stock Yard and Transit Company?

A. No, sir. I cannot do it.

[fol. 631] Q. Well, what are the records you said you could refer to? What records can you furnish?

A. I can refer to the records we have. I cannot look up those that were destroyed.

Q. All right.

A. We certainly have no records going back 70 years.

Q. What do you have, and what don't you have?

A. I will produce all I have.

Q. Do you know what you have?

A. No, not until I look it up.

Q. You referred to "the records", a few minutes ago. What records did you mean. I was referring to a time prior to 1920.

A. I will produce anything I have as far back as I can get it.

Q. When will you do that, within 10 days?

A. Yes, sir.

Mr. Smith: I ask permission to make such a statement part of this record.

Mr. Rynder: Mr. Examiner, I do not want to prolong the hearing. I was hoping we would be through here in an hour or two this morning. Yet, I would like to say this: I would like to see that before it goes into the record, so I wonder if this arrangement might be made, even though it goes beyond 10 days, that Mr. Henkle may produce what Mr. Smith has requested and that Mr. Smith will in turn [fol. 632] let me see it before it becomes part of the record so I will know whether there is any objection.

Mr. Smith: I will be very glad to. I will venture a guess that you would probably see it as soon as I did anyway.

Mr. Rynder: I just want to have an opportunity to see it, and if necessary offer any objection in writing before it becomes part of the record.

Exam. Carter: It will be so understood. Mr. Henkle will furnish this statement to Mr. Smith.

The Witness: To Mr. Smith?

Exam. Carter: Yes.

The Witness: Yes. That is the way I understood it.

Mr. Rynder: That is correct.

Exam. Carter: Mr. Henkle will furnish this information to Mr. Smith——

Mr. Smith: You can furnish it to Mr. Rynder, if you desire at the same time you send it to me.

The Witness: I agreed to furnish it to you.

Exam. Carter: Gentlemen, you have not let me finish.

Mr. Smith: Excuse me.

The Witness: Pardon me.

Exam. Carter: You are to furnish this information within —do you think 10 days will be sufficient?

The Witness: Yes. I can furnish all we have in 10 days.

Exam. Carter: Within 10 days.

[fol. 633] The Witness: Yes.

Exam. Carter: Send it to Mr. Smith with a copy of the information furnished to Mr. Smith to Mr. Rynder.

The Witness: Yes.

Exam. Carter: Is that satisfactory?

Mr. Smith: Yes.

Mr. Rynder: Yes.

Exam. Carter: Mr. Rynder will notify the Commission within five or ten days.

Mr. Rynder: If we are both in town, I think we can settle it over the telephone.

Exam. Carter: Very well. You may proceed.

By Mr. Smith:

Q. Now, Mr. Henkle, we have testimony in this record as to the movement back to 1918. Do you know what the movement was prior to that time, or do you have to go through your records to find out?

A. I would have to go through the records.

Q. At my request, did you deliver to me a number of copies of the so-called Red Book of the union stock yards, entitled "Union Stock Yard and Transit Company of Chicago, Seventy-second Annual Live Stock Report, Year 1937"?

A. Yes, sir, I did.

Mr. Smith: I will ask to have this identified as the next exhibit.

(Defendants' Exhibit No. 35 marked for identification.)

[fol. 634] By Mr. Smith:

Q. Mr. Henkle, I hand you what has been marked for identification as exhibit No. 35. I will ask you whether that is that report.

Exam. Carter: Before you answer that question, let me say this: with reference to this statement which Mr. Henkle is to furnish, I think Mr. Smith should be given the privilege at the time it is furnished of either introducing it in evidence or deciding not to.

Mr. Smith: Yes. After Mr. Rynder and I have had our conference on the subject, we will decide what to do with it, and if he wants to introduce it, then he ought to have the privilege.

Mr. Rynder: I thought, merely as a matter of fairness, I should see it before it goes in.

Exam. Carter: Yes.

Mr. Rynder: Then, I assume, Mr. Smith can offer it by letter and that if I have any objections, I can send a letter stating them.

Exam. Carter: I just wanted to make it clear that the decision rests with Mr. Smith in the first instance, as to whether he desires to introduce that statement in evidence.

Mr. Rynder: Surely.

Mr. Smith: That is satisfactory.

Exam. Carter: Very well. It will be so understood.

Mr. Rynder: I did not get the number of this exhibit.

[fol. 635] Mr. Smith: 35.

Exam. Carter: Now, there was a question which was unanswered. Read it, please, Mr. Reporter.

(Question read.)

A. It is.

By Mr. Smith:

Q. Are the facts and figures shown in exhibit 35, true and correct to the best of your knowledge and belief?

A. Yes, sir.

Mr. Smith: If the Examiner please, we now offer in evidence, exhibit 35.

Exam. Carter: Exhibit 35 will be received in evidence.

(Defendants' Exhibit No. 35, witness Henkle, received in evidence.)

Mr. Smith: May the record show that exhibits 33 and 34 are also received, Mr. Examiner.

Exam. Carter: Yes.

(Defendants' Exhibits Nos. 33 and 34, witness Henkle, received in evidence.)

By Mr. Smith:

Q. Is this a true statement, Mr. Henkle: The property of the Union Stock Yard and Transit Company is located west of Halsted Street and between approximately 35th Street and 47th Street in the city of Chicago. This property has been occupied by the Yards Company for stock yards purposes since the organization of the Company. A history [fol. 636] of the inception of the activities of the Yards Company is given in the decision of the Supreme Court of the United States, reported at 226 US 286 and also in the report of the Interstate Commerce Commission in the *loading and unloading charge case* 52 ICC 209?

A. I believe you said there "35th Street". I think it should be 39th Street, in the first part.

Q. State where the property of the Union Stock Yard and Transit Company is located in Chicago.

A. The principal properties of the stock yards company, and that part which is used for its stock yards, lies between 39th and 47th and Halsted and Racine, with an extension in the north part of the property over as far as Packers Avenue in the form of a triangle.

Mr. Smith: I want to show who owns that property west of those unloading chutes that these pictures cover. I do not know whether Mr. Kidwell knows that fact or Mr. Henkle.

By Mr. Smith:

Q. I call your attention to the area on the map immediately west of platforms 5 and 7 which is depicted in exhibit 34. I will ask you whose property it is south of the gate in the foreground of that picture.

A. That looks to me like the fire gate that is between the tracks that are leased to the Chicago Junction Railway, which gives the stock yards company over its own property access to Packers Avenue at that point.

Q. Where does the used and useful property of the stock [fol. 637] yards company end at that point? Where does it end in that vicinity?

Mr. Rynder: You may be putting Mr. Henkle in an embarrassing position when you ask him as to what is used and useful.

The Witness: Wait until I answer it. The property that is considered used and useful for stock yard purposes, has been described very fully and accurately by Mr. Christianson, and he is the only may so far as I know who thinks he knows what is used and useful. I do not, after reading what he says.

Mr. Smith: I think that was an inept question.

By Mr. Smith:

Q. Where is the Union Stock yards property line there?
A. At Packers Avenue, at that point where the gate is.
Q. At Packers Avenue.
A. Yes.
Q. Well, the gate is not at Packers Avenue.
A. The gate is further back.
Q. Where is the property line?
A. At Packers Avenue.
Q. The gate is further back?
A. The property line comes out there (indicating).
Q. Whose tracks are those (indicating)? It has been testified that there are four or five tracks on the one side and five or six tracks on the other. Whose property is that?
A. Some of them are leased to the Chicago Junction and [fol. 638] we have two manure tracks going in there.
Q. Where are they? Where are the manure tracks—or is Mr. Kidwell better acquainted with this than you are?
A. No. I was looking to see where the map shows it. It is shown on the map.

Mr. Reneker: Exhibit 20, I believe, shows it.

Mr. Smith: Let us have it.

The Witness: This map does not give the railroad tracks.

Mr. Reneker: It does not show the tracks, but it shows the location, Mr. Henkle, on exhibit 20.

By Mr. Smith:

Q. Now, exhibit 20 does not show the tracks, but if that will help you to answer the question, examine it.

A. It will not help me to answer the question. I want to see the map that shows the railroad tracks. I am not familiar with that map, or a map of this kind in this particular section. In order to properly get the information you asked for, we should have a map that shows all of those railroad tracks, and then identify those that are leased, and those that belong to us.

Q. Well, now, there are about 11 or 12 tracks there. How many do you lease?

A. I do not know, without referring to the map.

Q. Some of them are yours, and some of them are the Chicago Junction's?

A. I think there are not more than two that are retained [fol. 639] by us for industry tracks, such as manure and ammonizing plant tracks. The remainder are leased to the Chicago River & Indiana.

Q. That space between the tracks, extending from that so-called gate out to so-called Packers Avenue—does the yard company have easement over that, or what is the title situation with reference to that piece of property?

A. We own the strip in there that extends to Packers Avenue.

Q. You own the strip between those sets of tracks?

A. Yes.

Mr. Smith: I see. Is that according to your understanding, Mr. Tyler?

Mr. Tyler: Yes.

By Mr. Smith:

Q. Is this a correct statement: The Company, the Union Stock Yard and Transit Company started business under a special charter of the legislature of Illinois, dated February 13th, 1865?

A. That is correct.

Q. The company to which this charter was issued is the present company?

A. That is correct.

Q. Is this statement correct: At the time of the incorporation of the Yards Company stock subscriptions were taken to the extent of $1,000,000, of which amount $925,000 was subscribed by nine trunk line railroads reaching Chicago? [fol. 640] A. That is correct.

Q. Subsequently, however, the stock of the Yards Company owned by these nine railroads was sold in the open market, and since that time, about 50 years ago, no trunk railroad company has had any ownership interest in the Yard Company nor any control over its affairs?

A. That is correct.

Q. Is this a correct statement: The only present activity of the Yards Company is that of furnishing a loading, unloading and stock yards service in connection with the shipping, receipt and delivery of live stock?

A. What is the rest of it?

Q. You break in when you want to and answer it. Will you do that?

A. Will you read that part again.

Mr. Smith: Read him the question, Mr. Reporter.

(Question read.)

A. That is correct.

By Mr. Smith:

Q. Is this a correct statement: Its activities with respect to live stock fall in two distinct categories. The first activity is that of loading and unloading live stock for the railroads hauling such stock to and from the stock yards?

A. That is correct.

Q. From 1867 until the decision of the Supreme Court to which I have referred, this charge amounting to 50 cents a [fol. 641] car for loading and 25 cents a car for unloading was not contained in any tariff filed by the yards company with anybody. Is that right or wrong?

A. Correct.

Q. The charge, however, was paid to the yards company by the railroads. Is that correct?

A. That is correct.

Q. In the decision referred to, the Supreme Court held that the Yards Company was a common carrier, and thereafter the loading and unloading charges mentioned were incorporated in tariffs filed by the Yards Company with the Interstate Commerce Commission. Is that a correct statement?

A. That is correct.

Q. The amount of them, however, was not charged—or changed—until May, 1917—strike out "charged"—was not

changed until May, 1917, when they were increased by 25 cents. Is that a correct statement?

A. That is correct.

Q. The making effective of these increased charges led to the *Loading and Unloading Charge Cases*, before the Interstate Commerce Commission, in which reports were made at 52 I. C. C. 164. Subsequently these charges were increased to $1 per car for both loading and unloading under authority of the Interstate Commerce Commission given in I. & S. Docket 1301, 61 I. C. C. 223. Is that a [fol. 642] correct statement?

A. That is correct.

Q. Following the increase to a dollar, you subsequently made further increases in those rates, approximately in December, 1934, did you not?

A. Yes, sir.

Q. Do you have with you a copy of the tariff which you now have filed with the Interstate Commerce Commission?

A. I think I have.

Q. Mr. Henkle, do you have before you the currently effective tariff which the Union Stock Yard and Transit Company filed with the Interstate Commerce Commission?

A. I have.

Q. Do you have an extra copy of that?

A. I thought I had, but I do not find it there. We will supply it, if you need it.

Mr. Smith: I would like to make one part of the record. Could we file this one?

Exam. Carter: We will have to make it part of the record now.

The Witness: Yes. We can take this one out of this little book which I have. I. C. C. No. 12 cancels I. C. C. No. 8.

Exam. Carter: This tariff you are going to file is effective when?

The Witness: December 1, 1934.

[fol. 643] By Mr. Smith:

Q. Is there just one sheet to it, Mr. Henkle?

A. Yes.

Mr. Smith: May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Proceed.

Mr. Smith: I will ask to have this marked as the next exhibit.

(Defendants' Exhibit No. 36 marked for identification,)

By Mr. Smith:

Q. Referring to exhibit 36 for identification, there have been several supplements to this tariff; have those supplements all had to do with the cancellation of the rates shown, or the withdrawal of the tariff?

A. That is correct.

Q. And none of those supplements are now effective, are they?

A. No, sir.

Q. That is, the last one has been suspended in its operation by order of the Interstate Commerce Commission, has it not?

A. That was a cancellation tariff that was suspended.

Q. Yes.

A. But the rates stated in this tariff I. C. C. No. 12 are those that have been in effect since December 1, 1934, and are still in effect.

Exam. Carter: Just for the purpose of clarification, let me ask you this:

[fol. 644] By Exam. Carter:

Q. There was one supplement you filed subsequent to August 1, 1923, which was suspended and later withdrawn or canceled, is that correct?

A. That is correct, Mr. Examiner.

Mr. Smith: That is right.

By Mr. Smith:

Q. This is the only effective tariff that you now have on file with the Interstate Commerce Commission, is it not?

A. Yes, sir.

Mr. Smith: We now offer in evidence exhibit No. 36. Should I get another copy of that for the Examiner?

Exam. Carter: Mr. Henkle, will you send me a copy?

Mr. Smith: Will you mail that directly to the Examiner, please, Mr. Henkle?

The Witness: Yes.

Exam. Carter: Exhibit 36 is received in evidence.

(Defendants' Exhibit No. 36, witness Henkle, received in evidence.)

By Mr. Smith:

Q. Is this statement correct: Except for the period from May, 1917, to March 1, 1920, the loading and unloading charges of the Yards Company have always been paid by the line-haul railroads hauling live stock to and from the yards, and the service performed by the Yards Company for the amounts thus paid is entirely separate and distinct from any other service performed by it?

[fol. 645] A. (No answer.)

Exam. Carter: Would you like the reporter to read that back to you?

The Witness: Yes. Read that to me.

(Question read.)

A. I am a little confused as to what the date of 1920 had to do with it.

Mr. Smith: Well, maybe I can refresh your recollection about that.

By Mr. Smith:

Q. Was there a period from May, 1917 to March, 1920, when there was a dispute between the railroads and the stock yards company as to whether the railroads should be required to pay the full amount of the unloading charges assessed by the stock yards?

A. I believe that was the period during the time that the——

By Exam. Carter:

Q. Was that not the period during which you attempted to collect the 25 cents more per car?

A. That is it.

Mr. Smith: They increased the charge, and the railroads did not absorb the increase.

The Witness: That was along about the time of the Railroad Administration. I see the point now.

Mr. Smith: Mr. Reporter, read the statement to the witness, and let him state whether it is correct.

(Question read.)

[fol. 646] A. That is correct.

By Mr. Smith:

Q. Is this statement correct: In the *the* year 1930 the Stock Yards Company unloaded for twenty-three railroads 204,828 cars containing more than 14,000,000 animals and loaded out 48,501 cars. Practically all of these cars were brought to the chutes of the Stock Yards Company in train lots, many of these trains having as many as 70 cars?

A. That is correct.

Q. Is this statement correct: These cars are brought to the unloading platforms of the Stock Yards Company by the engines and crews of the line-haul carriers, and the crews remain until the live stock is unloaded from the train and immediately take back to their lines the empty cars?

A. That is correct.

Q. Is this correct: It is imperative that empties be immediately removed in order to prevent a congestion which would greatly delay the entire movement?

A. That is correct.

Q. Is this correct: The Stock Yards Company has facilities for setting 50 cars at one time with two chutes to each car length?

A. That is approximately correct. It may vary slightly at this time on account of some chutes that were destroyed by fire, but it is approximately correct.

Q. Is this correct: The first train arriving is unloaded [fol. 647] into the odd-numbered chutes, and as soon as the empty train is removed another train can be set at the same platform and unloaded into the even-numbered chutes, and while this latter process is going on, the stock yards employes are removing from the odd-numbered chutes the animals from the preceding train, which makes the process practically continuous?

A. That is correct.

Q. Is this correct: On arrival of a train of live stock at the chutes, the employes of the Stock Yards Company immediately start unloading the animals into the chute-pens?

A. That is correct.

Q. Is that correct?

A. Yes, sir.

Q. Is this correct: The train crew remains at the platforms while the animals are being unloaded, and take the cars back to their own lines, as soon as empty. The stock yards employes on the platforms or unloading chutes, must make records of the cars from which they are driven. While this is being done, the conductor takes the waybills to the Receiving Office, where clerks prepare bulletins, which are publicly posted, to notify the consignees who, in most cases, are the commission firms, or other selling organizations. At the same time the original records are started and passed along to the Yardmasters, who continue the records, showing the disposition of the animals. Record must be kept of the dead or crippled animals, both the railroad [fol. 648] and the shipper looking to the Stock Yards Company as their neutral representative to protect their interests. Is that a correct statement?

A. That is correct.

Q. Is this correct: Other records must be made from which the freights may be collected?

A. That is correct.

Q. Is this statement correct: If the consignees are not on hand to receive the animals on arrival, the Stock Yards Company removes them from the unloading chutes to other pens where they are locked up and held until called for by the consignee. The service of unloading stock thus performed by the Yards Company definitely terminates when the animals are put into the chute pens. No other service is performed by the Yards Company for the unloading charge paid to it by the railroads. The consignees may take delivery of the animals at the chute pens if they so desire, but if this is done, it must be done almost simultaneously with the unloading of animals into the chute pens. This immediate removal of the animals from the chute pens is absolutely necessary in order to preserve an even flow of live stock from the cars into the yards. If the consignees are not present to take delivery of animals consigned to them immediately upon their placement in the chute pens, they are removed from the chute pens to other pens by employes of the Yard Company. Is that state-[fol. 649] ment correct in its entirety, or incorrect?

A. It is correct in its entirety.

Q. Is there any modification that you would make in it?

A. I think not. I am assuming, Mr. Smith, you are reading the entire statement.

Q. No.

A. I assume you are not leaving out anything.

Q. Do not assume anything. I am asking you a question. I am asking you whether the statement I read, or which I stated to you, rather, is correct.

A. Then, I must see what you are reading, because you are reading from a statement I made, and I want to ascertain as you go along whether you are leaving out any parts important to me, in the statement. I think I am entitled to have the entire statement which you are reading from, from my previous testimony, read completely, and not have you leave out any qualifying sentences I might have placed in the testimony at that time.

Q. Now, Mr. Henkle, I am not going to read every word you uttered when you were on the stand in the Hygrade case, if that is what you are referring to.

A. I hope you are not.

Q. I am not going to do that for a number of reasons which are numerous and adequate. I am going to ask you whether certain things are true or untrue.

[fol. 650] Exam. Carter: I understand there is here present associate counsel for the stock yards company, is that correct?

Mr. Smith: That is correct.

Exam. Carter: That record from which Mr. Smith is reading is available.

Mr. Rynder: What record is it?

Mr. Smith: Let me make this statement, Mr. Examiner——

Mr. Tyler: Let us go off the record.

Exam. Carter: It is available to the stock yards company.

Mr. Smith: I have secured this from the attorney for the stock yards company, Mr. Towner.

Exam. Carter: If the attorney for the stock yards company desires to cross-examine Mr. Henkle, and he makes that request, I will consider that request as made.

Mr. Smith: Let me make this perfectly clear, Mr. Examiner. I also want to call this to Mr. Henkle's attention. I am not attempting to reproduce here everything that Mr. Henkle said in the Hygrade case, for a number of reasons.

In the Hygrade case counsel for the stock yards were counsel for the railroad companies who defended that case. Mr. Henkle was put on the stand by his counsel, Mr. Towner. There are a number of things said with reference to the peculiar situation of the Hygrade Company which are not relevant here. There are, I think, statements made here that go to other issues between the railroads and the stock [fol. 651] yard company, as to which the parties may not be in agreement. In addition to that, as I go along, I am asking questions that have nothing to do with what was said by Mr. Henkle in the Hygrade case. Points are being brought out which I think are relevant to the things under consideration at the moment I put Mr. Henkle on notice that the only thing I am asking him is whether a statement I make to him is true or false. If you want that last statement broken down and read in parts, and if you want to go along and say, "This is true" and "That is not true", that is your privilege.

By Mr. Smith:

Q. Can you say whether that statement is true, or do you want it read sentence by sentence?

Exam. Carter: Mr. Blanchard, do not counsel the witness, please, sir.

Mr. Blanchard: I did not say anthing.

Mr. Rynder: I am just waiting until this colloquy is ended, to make a remark here. While I have no doubt that the statement was made by the witness at a prior time, and that he would make the same statement if asked independently at this time, in part, it calls for a conclusion of law, as I see it, which may or may not be modified by the decision heretofore made by the Supreme Court in the case of Adams versus Mills. While I assume the Examiner will admit the statement, I am going to offer a formal objection, so I am not bound by it.

[fol. 652] Exam. Carter: Please note an objection for Mr. Rynder. I will admit the statement. You may note an exception. Do you desire that statement broken down into sentences? I think you have already said that that is correct; you have already answered that that is correct, but you then made that observation. Do you want that statement broken down into sentences? Mr. Smith will ask you the question as to——

The Witness: No, not that particular question.

Exam. Carter: Well, now, if you do at any time in a subsequent examination, you say so.

The Witness: Has Mr. Smith any objection to my reading along with him to see what he does leave out?

Mr. Smith: Not a bit. Sit right over here with me so you see what I put in, and what I leave out.

Mr. Rynder: Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Let us proceed.

Mr. Smith: I had read something from page 215. Now, let me understand this, Mr. Henkle.

By Mr. Smith:

Q. Are statements made to you now either true or false based on the facts, or are they true or false depending upon whether you said the same thing in the Hygrade case?

A. I might have said one thing in the Hygrade case that [fol. 653] was true at that time, under the conditions I was discussing at that time, that might be changed by conditions at this time.

Q. Exactly. What is your difficulty about stating here when a question is asked you, whether or not it is today true or not true?

A. In a number of the statements I made in that case there were qualifying statements that had to do with something you might pick out here, or something you might pick out there. In other words, I think it was in that record that I endeavored to show that I could accurately describe the activities that were performed by the stock yards company. I could also accurately describe all of the charges that were made to everybody in every direction, by the stock yards company. But I have never been able to accurately define to the satisfaction of anybody except myself the particular services there, from beginning to end, that were covered by specific charges. I have stated all along that a charge might cover a great deal more for one person than for another, and when you tear my statements apart, I like to have something of this kind to see in my own mind that they are tied together as a whole.

Q. I am not tearing anything apart. I am merely going to ask you whether certain things are true or untrue, and

you can answer that "Yes" or "No". You can make any qualification you want to. Have you any qualification to make with reference to any answer you have heretofore [fol. 654] made in answer to my questions?

A. No, sir.

Mr. Smith: Read the last part of that question of mine.

(Record read.)

By Mr. Smith:

Q. Now, will you state whether you want to hear that statement read sentence by sentence, and record your answers as to whether it is true or untrue, or do you want to state whether the statement as a whole in its entirety, is correct, or do you want the entire statement read to you?

A. That is a three-pronged question.

Q. Yes. Just state what your pleasure is.

A. I have no objection to the testimony as far as it has gone. The only thought that arose in my mind is when there was a statement regarding records that are made for freight purposes, that was one of the basic records, and it is covered further in the statement I made at that time as to exactly how all of the records are made through the district agency office working with us. So, that is the kind of statement that has to be modified as you go along.

Mr. Smith: Mr. Reporter, go back to the last substantive question of mine in which I asked whether it was true or untrue, and read that to Mr. Henkle, sentence by sentence. At the end of each sentence, Mr. Henkle, I wish you would state whether it is true or not true.

(The question was read as follows):

[fol. 655] "Q. Is this statement correct: If the consignees are not on hand to receive the animals on arrival, the Stock Yards Company removes them from the unloading chutes to other pens, where they are locked up and held until called for by the consignee?"

A. That is correct.

"Q. (Continuing) The service of unloading stock thus performed by the Yards Company definitely terminates when the animals are put into the chute pens."

By Mr. Smith:

Q. Is that correct?

A. That was my statement at the time, but there has been a lot of disagreement with that statement since.

Q. That is your statement at what time?

A. At the time before this Hygrade case, in 1931.

Q. Was it true then?

A. Yes.

Q. Is it true now?

A. In my opinion it is, yes.

Q. I am just trying to get your opinion.

A. Yes.

Mr. Smith: Read him the next part of the question, Mr. Reporter.

Mr. Rynder: May it be noted that that was the particular part of this question to which my objection was made?

Exam. Carter: Yes.

[fol. 656] Mr. Smith: Read the next sentence, Mr. Reporter.

"Q. (Continuing) No other service is performed "by the Yards Company for the unloading charge paid to it by the railroads."

By Mr. Smith:

Q. Is that correct?

A. That is correct.

Mr. Rynder: My objection went to that part of it, too.

Exam. Carter: Yes.

Mr. Smith: Go ahead.

"Q. (Continuing) "Consignees may take delivery of animals at the chute pens if they so desire, but if this is done, it must be done almost simultaneously with the delivery of animals into the chute pens."

[fol. 657] By Mr. Smith:

Q. Is that correct?

A. That is correct.

"Q. (Continuing) This immediate removal of animals from the chute pens is absolutely necessary in order to preserve an even flow of livestock from the cars into the yards."

By Mr. Smith:

Q. Is that statement correct?
A. That is correct.
Q. Answer so I can hear you, please.
A. That is correct.

"Q. (Continuing) If the consignees are not present to take delivery of animals consigned to them immediately upon their placement in the chute pens, they are removed from the chute pens to other pens by employees of the Yard Company."

By Mr. Smith:

Q. Is that statement correct?
A. That is correct.

Exam. Carter: We will recess for five minutes.

(Short recess.)

Exam. Carter: Let us proceed, gentlemen.

By Mr. Smith:

Q. Is the heavy concentration of arrivals of livestock at the Union Stock Yards during early morning hours?
A. Yes, sir.
Q. Do you sometimes refer to that as the run?
A. Well, the run, on Monday morning, for instance—we would say it came in early if they all got there by 4 'clock in the morning, and we might say it was late if they got in at 8 o'clock, but ordinarily they come in from midnight [fol. 658] on, a few before midnight.
Q. And the time when they come in with special concentration you refer to as the run of the stock?
A. No. The run means the entire count of, say, 1000 cars. We will say the run was 1000 cars. It would not have any definite relationship to the time they came in.
Q. It covers the entire inbound movement during a particular day?
A. Yes. That is correct.
Q. And during the run as you call it—that is to say while the trains are coming in, is it possible for animals to be stored in the chute pens for any time whatever?

A. The chute pens under our practice are not intended to be used as storage or holding pens. We get them out of the chute pens as quickly as we possibly can.

Exam. Carter: You have not really answered the question, Mr. Henkle.

The Witness: Sir?

Exam. Carter: I do not really think you have answered the question. You said "it is our intention", or words to that effect. Read the question, Mr. Reporter.

(Question read.)

By Mr. Smith:

Q. In answer to that question in the testimony you gave in the Hygrade case, did you say: "No, sir. We remove them as quickly as possible"?

[fol. 659] A. I did say that in the Hygrade case, yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Now, you have been testifying up to this point about the loading and unloading service covered by your tariff filed with the Interstate Commerce Commission, have you?

A. Partly. The service we have been referring to as unloading service may lap over further than the chute.

Q. It may?

A. It may.

Q. Just elaborate on that a little bit.

A. Well, in the process of unloading livestock when we remove it from the chute to a holding pen, that may or may not be called an unloading service, depending upon who is disputing about it. We call it an unloading service which leads back to placing the animals when necessary into the holding pens.

Q. Have you changed your mind about that since the Hygrade case?

A. No. I may have changed my language in endeavoring to describe the practice.

Q. Let us go along. Is this a correct statement: The second activity of the Yards Company, entirely separate and distinct from its activities in unloading or loading livestock, is that of furnishing a stock yards service to shippers and consignees of livestock?

A. That is correct.

[fol. 660] Q. The Yards Company is a stock yards under the Packers and Stock Yards Act of 1921 and is posted by the Secretary of Agriculture as such. Is that a correct statement?

A. That is correct.

Q. As such a stock yards it performs the service of furnishing facilities at the yards in connection with the receiving, buying, selling, marketing, feeding, watering, hauling, delivery, shipment, weighing or handling of livestock in interstate commerce. Is that correct?

A. Yes, sir.

Q. If charges for these services are filed by it with the Secretary of Agriculture as required by the Packers and Stock Yards Act. Is that correct?

A. Yes, sir.

Q. Where are your holding pens located at the yards?

A. All over the yards.

Q. You are in the process of trying a case before the Secretary of Agriculture, are you not?

A. We have a case pending, yes.

Q. That has to do with your rates, charges, services and practices under the Packers and Stock Yards Act, is that so?

A. Yes, sir.

Q. You have taken the position in that case, have you not, as to what facilities and services are subject to the jurisdiction of the Secretary and what are subject to the jurisdiction of the Interstate Commerce Commission?

[fol. 661] A. In that proceeding there are many different opinions and statements as to what are stock yard services and what are loading and unloading services.

Exam. Carter: You are not answering the question, Mr. Henkle.

The Witness: What was the question again?

Exam. Carter: Read the question.

(Question read.)

A. Yes, sir.

By Mr. Smith:

Q. Now, you testified at great length in that case, did you not?

A. Yes, sir.

Q. You say these holding pens are located all over the yards.

A. Yes, sir.

Q. That is, the holding pens into which you place these animals when they are not taken possession of at the unloading chute pens?

A. No. I said that there are holding pens all over the yards. We place them in the nearest holding pen we can find under the conditions we have described.

Q. Yes.

A. But they may be in any part of the yards.

Q. In other words, circumstances may require you to go to some distant point in the yards?

A. If all of the platform holding pens were taken up.

Q. Yes.

[fol. 662] A. It would be necessary to go further.

Q. Have you taken the position before the Secretary of Agriculture that these holding pens and the alley ways throughout the yards over which animals are driven to those holding pens are all property used for the railroads, or in connection with your common carrier service in unloading animals and have asked him to exclude those from his rate base in determining the stock yards rates?

A. We have not.

Q. Why not?

A. Throughout that case I maintained that we used whatever pens were available or necessary in the yards either in the unloading activity or in the stock yards activity, whichever might better facilitate the handling of the livestock through the yards for all concerned, and not to my recollection has there been any definite setting aside of holding pens and describing them as under the Packers and Stock Yards Act, or as wholly under the Interstate Commerce Commission tariffs.

Q. Of course, that is not an answer to my question. Perhaps you can answer this one more easily: in your hearing before the Secretary of Agriculture have you taken the position that you were compensated under your tariff filed with the Interstate Commerce Commission for driving animals from the unloading chutes to the holding pens through the yards after their arrival and that you were compensated in the tariff for the use of the facilities throughout the yards [fol. 663] over which those animals were driven?

A. The position we have taken before the Secretary of Agriculture in that connection is clearly set forth in our tariff placed before him.

Q. Is that your complete answer to my question?

A. Yes, sir.

Mr. Smith: I cannot accept that as an answer to my question.

Exam. Carter: I do not think that is an answer to the question. Do you understand the question, Mr. Henkle?

The Witness: Read it again.

Exam. Carter: Read the question.

The Witness: I thought I did.

(Question read.)

Exam. Carter: You can answer "Yes" or "No", whether you have taker such a position. I think then you can elaborate on it if you want to.

By Exam. Carter:

Q. I am just making a guess, but is it true that you have not taken such a position?

A. My guess is that the answer is "No".

Exam. Carter: I do not want you to guess. I was the one who was guessing.

The Witness: I mean, it was my thought I should answer "No" to that question. But, there was running through [fol. 664] my mind the different sections of the tariff. There are some sections in the tariff for services for which.——

By Exam. Carter:

Q. Which tariff are you talking about?

A. The Packers and Stock Yards tariff—for which we have made a charge, but nobody has agreed they would pay it.

Mr. Rynder: May it be understood, if the Examiner please——

Exam. Carter: Just a moment.

By Exam. Carter:

Q. Is it true, then, that the answer to Mr. Smith's question is "No"?

A. Yes. The answer is "No".

Mr. Rynder: May it be understood that the tariff to which Mr. Henkle referred is exhibit No. 3 in this case?

Mr. Smith: Yes.

The Witness: May I see it?

Mr. Smith: That is the Secretary of Agriculture's tariff—or rather, the tariff filed with the Secretary of Agriculture. I want to ask Mr. Henkle that.

By Mr. Smith:

Q. Is that your current tariff filed with the Secretary of Agriculture?

A. Yes, sir.

Q. That is, exhibit No. 3?

A. Yes, sir.

Q. Have you taken the position before the Secretary of Agriculture that any facilities or property of the Union Stock Yard and Transit Company lying beyond the unload-[fol. 665] ing chutes, or that any service of driving animals through the yards was a service that you were compensated for under your tariff filed with the Interstate Commerce Commission, and that a deduction therefor should be made by the Secretary of Agriculture in determining his rate base?

Mr. Rynder: Read that question, please.

(Question read.)

A. I took no position before the Secretary of Agriculture as to what I was to receive under the Interstate Commerce Commission tariff other than the rate as stated; and we also set forth that the chutes and the alleys behind them were supposed to be used for unloading.

Q. That is, the chute and the alley immediately adjacent to the chute pen?

A. That that was part of the loading and unloading facilities, as I recall it in that case, but the record will show.

Q. Did you ask to have that excluded from the used and useful property for which you were to receive compensation from your tariff filed with the Secretary of Agriculture?

A. To the best of my recollection, they did not make any request of us as to what we thought was used and useful. They set up what was used and useful themselves.

Q. The yards company through its employees took the position with respect to all the property and facilities respectively owned and used or given by the yards company in [fol. 666] that proceeding, did it not?

A. Read that question. I cannot understand that.

Mr. Smith: Let me put it in a different way. That was a poorly put question. I will reframe it.

By Mr. Smith:

Q. The yards company, through its officials, in that proceeding at that time took a definite position, did it not, with reference to the property, facilities and services which it respectively owns and performs, as to whether or not they came under the Packers and Stock Yards Act, is that not so?

A. That question is difficult for me to answer because that record contained 12,000 pages, and a ton of exhibits.

Exam. Carter: They did take a position there, though, did they not?

Mr. Smith: Let me ask you this——

Mr. Rynder: Let me ask Mr. Henkle, please, to refresh his memory before he answers that, because I would like him to consider whether this was not what happened in that case, that Mr. Henkle and other officials of the yards company testified at length as to the facts in connection with that stock yards property, but that the position taken with respect to each item was taken by their attorneys in their briefs, exceptions, and so forth.

Exam. Carter: Some of these questions you are addressing to Mr. Henkle. When you refer to him, you are referring [fol. 667] to his company, are you not, Mr. Smith?

Mr. Smith: To his company, of course.

Exam. Carter: The company he represents.

Mr. Smith: Yes.

Exam. Carter: That is what I understood, especially with reference to the position part of it.

Mr. Rynder: Then I offer another objection on that, that while I think the situation is as stated, Mr. Henkle testified as to the facts and counsel took their position in their briefs and otherwise. I happen to notice that Mr. Tyler nodded his head to that. The best evidence as to that is the record and briefs.

Mr. Smith: Probably the best evidence will be the decision, when we get it. Up to this point I am inquiring from Mr. Henkle——

Mr. Rynder: The decision would not necessarily show the position taken. The decision may show what the Secretary decides.

Exam. Carter: Well, I think the briefs are the best evidence.

The Witness: I might say I am confused in answering Mr. Smith's questions—and honestly confused—because of the fact I testified as great length in the case, and the Packers and Stock Yards witnesses and those who were administering the Act took their own position without regard to what I said, so that——

[fol. 668] Exam. Carter: Just a moment, please. The objection is a technical one, of course, but I think it is proper. That is, the record and the briefs would be the best evidence of what position was taken. I am not trying to get you to waive that objection, but regardless of whether or not Mr. Henkle may agree or disagree with the position that was taken in that case, he must undoubtedly know what the position was, in general. I am not going to insist on—as I say, if you insist on your objection, I feel that I would have to sustain it. However, the Commission would like to have the facts in this case. I may state on the record that the yards company in different proceedings before the Commission has taken different and conflicting positions.

Mr. Rynder: Mr. Examiner, I would like to make one statement——

Exam. Carter: I am not saying that Mr. Henkle has, now. I am not addressing that to him.

Mr. Rynder: I recognize the difficulty of producing that record, but the only way in which one can possibly find out, sentence by sentence and syllable by syllable the exact position—if you want to put it that way, although I do not think offhand that the firm of Winston, Strawn and Shaw, so ably represented by my good friend Mr. Tyler, would have their witnesses state position. I think their witnesses stated the facts. I see that Mr. Tyler seems to be agreeing [fol. 669] with me. However, as I started to say, that record is some 10,000 pages long——

The Witness: 12,000 pages.

Mr. Tyler: It is about 11,000 pages long.

Mr. Rynder: Well, it is 11,000 pages long, with no end of exhibits. If there is any point in getting the position here, I would be willing to get it by letting Mr. Tyler give each of us his brief, for I imagine it is stated there. However, if you are going to ask this witness to sum up a 10,000 page record, I do insist on my objection.

Mr. Smith: All right. I think we will get along all right.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Is this statement true: Ever since the effective date of the Packers and Stock Yards Act, the Secretary of Agriculture has exercised a continuous jurisdiction over the yards company?

A. That is correct.

Q. Is this statement correct: Voluminous hearings were held over a period of years and a number of reports were issued.

A. Yes, sir.

Mr. Smith: At this point I offer a certified copy of the order of the Bureau of Animal Industry in Docket 472, entitled "Order of Inquiry and Notice of Hearing Under the Packers and Stock Yards Act, 1921, As Amended." I will [fol. 670] ask that this be given exhibit No. 37.

Exam. Carter: It may be so marked.

(Defendants' Exhibit No. 37 marked for identification.)

Mr. Smith: I now offer in evidence Defendants' Exhibit 37.

Exam. Carter: Is there any objection?

Mr. Rynder: No objection.

Exam. Carter: Exhibit 37 will be received.

(Defendants' Exhibit No. 37, Witness Henkle, received in evidence.)

By Mr. Smith:

Q. Will you examine exhibit No. 37, Mr. Henkle, and tell me whether that case is now pending before the Secretary of Agriculture.

A. Yes, sir.

Q. That is the case to which reference has been made in my questions and your answers, is it not?

A. Yes, sir.

Q. A proposed report has been issued by Examiner Brooks in that case, is that not correct?

A. Yes, sir.

Q. Now, is this a correct statement: all of the charges for Stock Yards services, contained in the stock yards tariff filed with the Secretary of Agriculture are involved in the proceeding, Docket 472 of the Bureau of Animal Industry and are being investigated with the single exception of the [fol. 671] unloading service as you have described it, and the loading service.

A. That is correct.

Q. Is this a correct statement: A service additional to the unloading service is performed by the yards company, —is that correct?

A. Yes.

Q. Even on livestock of which possession is taken by the consignees immediately upon unloading and while the stock is in the chute pens? Is that correct?

A. Yes, sir, and the service referred to is, I think, explained in the next paragraph.

Q. Is that statement correct that I have read to you?

A. Yes.

Q. Is this correct: such animals—referring to the animals to which I referred in my last question—must be driven across the property of the yards company, there being no other way of getting the animals from the chute pens to a location outside of the yards? Is that a correct statement?

A. That is a correct statement.

Q. Is this a correct statement: On all animals of which the consignee does not take possession while they are in the chute pens, a yardage service is also performed? Is that correct?

A. Yes, sir, that is correct.

Q. And is this correct: These animals—referring to the animals I have referred to in my last two questions—must [fol. 672] be removed almost immediately to other pens and are there held for sale, and during this time they receive the stock yards services which I have mentioned? Is that correct?

A. That was correct at that time, in 1931, but in the present tariff which is under consideration before the Packers and Stock Yards Administration, there are additional charges and the services and facilities furnished for those

charges are set forth in the tariff now before the Secretary of Agriculture, which lap over the question we are just talking about, with some of the animals.

By Exam. Carter:

Q. Are these services any different now than they were in 1931, that you have to perform?

A. No. The services we perform now are substantially the same as they were in 1931. The only change has been in an attempt to——

Q. There has been no change in the services?

A. None in the physical services.

By Mr. Smith:

Q. Then, if your answers to my last several questions are correct, the yards company begins to perform a stock yards service immediately upon the animals being taken out of the unloading chutes, is that right?

A. I would not endeavor to state that any more. The more hearings I attend and the more evidence I give, the more confused I am as to where the point lies.

Q. You are just confused about this whole situation, are you?

[fol. 673] A. Yes, and I have plenty of company in that situation.

Q. Are you qualifying any of the answers you have given me up to this time? Do you care to qualify anything you have said?

A. I have already qualified the answers given in 1931 by stating that our——

By Exam. Carter:

Q. You have given such qualifications as you wanted to, so far, is that right? You have already done that, have you not? There is no use of repeating it.

A. I think I have covered it by the qualifications I have already made.

Exam. Carter: Proceed, Mr. Smith.

By Mr. Smith:

Q. Now, Mr. Henkle, is it your position here in effect that with respect to the question of where the railroad's service

ends, the common carrier railroad service ends and the stock yards service begins, that you have become confused since you testified in the Hygrade case and now you do not know what the truth is? Is that it?

A. That is exactly my position.

By Exam. Carter:

Q. As you stated before, there has not been any change in the service performed in 1931 as compared with the service performed today?

A. That is right.

Q. That is, with reference to the physical service performed?

A. That is right, Mr. Examiner. The application of the charges is the thing in which I am confused.

[fol. 674] Mr. Blanchard: Just a minute, Mr. Henkle.

By Mr. Blanchard:

Q. Your answers to Mr. Smith were referring to commission men, were they not? Has there not been a change in the service performed on directs beginning in May, 1933, May 25, 1933?

A. There are some services we performed in 1931, that are not performed today on certain shipments. There is a difference in the weighing, and a greater proportion of the animals that are received direct are handled direct from the chutes. But our facilities are the same; if anybody wants weights, we give them.

Exam. Carter: Let me ask you this:

By Exam. Carter:

Q. Are the services which you did perform on direct shipments in 1931 any different from the services which you would perform today on direct shipments, the actual physical services?

A. The actual physical services today, it seems to me, are varied only in some minor details. Take, for instance, the directs——

Q. I am speaking about directs. I confined my question to direct shipments.

A. Well, speaking of directs——

Q. Do you perform any different service today on direct shipments than you did in 1931?

A. We do.

Q. What is the difference?

[fol. 675] A. Because, we were asked at that time to weigh, and did weigh, more of the directs than we do now. We are not asked to weigh directs now, that is, most of them.

Q. You were paid for that service, though, were you not?

A. That is one of the charges.

Q. I mean, on direct shipments today you would not perform a weighing service without extra compensation, would you—or would you? What charges would you apply on a direct shipment today?

A. The same charges as on all other receipts, exactly.

Q. Do you make an extra charge for weighing?

A. No, sir.

Q. That is included in your yardage charge?

A. It is included in some of our charges. We weigh for anybody on the market that brings livestock up to the scale to be weighed.

Q. I think we are getting a little bit afield. However, I would like you to point out to me if you can, and if there is any, what difference there is in the service you would perform today on direct shipments as distinguished from the service you would perform on the same type of shipments in 1931.

A. It seems to me the only difference is in the weighing and in the percentage of the directs that are taken directly from the chutes without being placed into holding pens.

Q. In 1931 if the request was made to weigh shipments of [fol. 676] your stock, you would have done so?

A. Yes.

Q. And if the same request was made today, you would do so?

A. Yes.

Q. Is that right?

A. I am not sure under what charges it would come, however.

By Mr. Rynder:

Q. Mr. Henkle, the first weighing in any event would come under the yardage charge, would it not?

Mr. Smith: What was that question? Read it to me please, Mr. Reporter.

(Question read.)

A. The yardage charge covers one weighing, yes, sir.

By Mr. Rynder:

Q. Then you have additional charges for additional weighings?

A. Yes, for each consequent weighing.

Exam. Carter: I think you are perhaps confusing in your mind the service performed on direct shipments as distinguished from other services.

By Exam. Carter:

Q. In other words, with reference to other shipments, as I understand it, they are weighed and the yardage charge includes the cost of weighing?

A. Yes, sir.

Q. But as to direct shipments, they are not weighed?

A. Most of them are not.

Q. Most of them are not weighed?

[fol. 677] A. No.

Q. But the yardage charge is——

A. Just the same.

Q. —just the same?

A. Yes.

Q. It is the same as would apply on the other shipments which are weighed?

A. That is correct.

Q. But if you take a direct shipment today and a direct shipment in 1931, for the same kind of service is there any difference in the service you perform?

A. On directs, of course, we perform less service if the consignee of the directs removes them directly from the chutes instead of it being necessary for us to take them to holding pens before delivering them to the consignee.

Q. That would apply to 1931 just the same?

A. Yes.

Q. Under the same conditions?

A. Yes.

[fol. 678] Mr. Blanchard: May I ask one question of the Examiner——

Mr. Smith: I would like to ask Mr. Henkle——

Mr. Blanchard: I would like to ask one more question of the Examiner, for my own information. I would like to know whether or not the Examiner is concerned with what

services the stock yards company would perform in 1931 and what service they actually do perform today?

Exam. Carter: I had both things in mind, and I understand from Mr. Henkle, from his answers to my questions, that the difference in the service performed today as distinguished from that performed in 1931, is that a lesser number of directs are requested to be weighed.

Mr. Blanchard: And that on a greater number of directs, delivery is taken at the chutes.

The Witness: Yes.

Exam. Carter: Whereas, in 1931, perhaps on a greater number of directs, weighing was requested.

Mr. Blanchard: That is right.

Exam. Carter: In 1931 you may have had to weigh more direct shipments than you do today?

The Witness: That is correct.

Exam. Carter: Is that the difference, then? I do not know. I do not know whether that is true or not. I am just asking.

Mr. Blanchard: Mr. Examiner, I do not know whether my [fol. 679] friend, Mr. Smith, is hard of hearing or not, but I started to address my question to you before he said anything to Mr. Henkle. He kept on talking and I had to raise my voice to retain my priority on the floor. If I talked too loudly, I want to extend my apologies to you.

By Exam. Carter:

Q. Do you know of any other difference?

A. I do not recall any other difference.

Exam. Carter: You may proceed, Mr. Smith. Excuse the interruption.

By Mr. Smith:

Q. Now, in discussing whether or not there has been any change in the yardage service performed on directs, you referred to the number that are taken at the chutes, and the number that are taken at the holding pens. In your testimony in Docket 472, that has been referred to here, or that of any subordinate of yours representing the company, was it testified that any service of driving any animals through the yards, or the use of the facilities in connection therewith was compensated for by your tariff filed with the Interstate Commerce Commission?

Mr. Rynder: Just a moment.

The Witness: I do not know.

Mr. Rynder: Just a moment. I object to that question upon the ground that the evidence of Mr. Henkle and the others in that case is the only admissible evidence.

Exam Carter: I will sustain the objection.

[fol. 680] By Mr. Smith:

Q. Is it your position, or is it your view here today, that the Union Stock Yard and Transit Company receives any compensation from its tariff—or, under its tariff filed with the Interstate Commeree Commission for the driving of any live stock through the Union Stock Yards, or any compensation for the use of facilities or property of the yards, over which the animals are driven either by the yards or anybody else?

A. I have no views on that point.

Mr. Smith: I ask the Examiner to direct the witness to answer that question

Exam. Carter: Will you read the question, please, Mr. Reporter.

(Question read.)

Exam. Carter: The Commission would like to have your view on that, Mr. Henkle.

The Witness: That is a very complicated and involved question.

Exam. Carter: Simplify your question, please, Mr. Smith. Break it down a little bit.

The Witness: I am unable to answer it.

Mr. Smith: Perhaps I can make an explanation to the witness, and to the Examiner. I am perfectly willing to submit the entire testimony of the witness in the Hygrade case, simply for the purpose of permitting the continuity of it to [fol. 681] clarify the answers he has given here. In that testimony he took the clear-cut unequivocal position that the yards was engaged in two distinct services, a transportation service or unloading service which extended and continued up to the point where the animals were put into the unloading chutes; then, he testified as he has testified here that at that point the stock yards service started, and that the moving of the animals by the consignee thereof over the property of the yards company, or the moving of

the animals by the yards company, was in the second category. As I have understood it, the witness has attempted here now to inject some doubt as to whether he is standing on that proposition. He has talked about some transfer of the animals, and not being sure what that was under. He was sure in 1931. Within the last year Mr. Henkle has been extensively engaged in testifying before the Secretary of Agriculture. My position is, he cannot take one position properly before the Commission, and a different one before the Secretary of Agriculture. I am trying to get him to state whether within the last few months, appearing before the Secretary of Agriculture, he has told the Secretary, or anybody testifying for his company has stated to the Secretary that the Secretary ought to recognize that any facilities over which animals are driven beyond the unloading chutes or that any services involved in the way of driving those animals, is part of the transportation service compensated [fol. 682] for by the tariff filed with the Interstate Commerce Commission, and should not be included in the rate base which the Secretary is to make. With that explanation, I ask that my question be read to the witness, and that he be required to answer it.

Mr. Rynder: First, the witness does not have to state a position. I am strictly of the opinion he has stated no position in 472. As I have said before, with what seems to be the concurrence of Mr. Tyler, I am certain these witnesses, and others, stated facts, and that counsel have taken their positions. Frankly, I am not familiar with it. I have not read their briefs, but that is where the position was stated I can only imagine that in urging an answer to this question, which to my mind is utterly inadmissible, Mr. Smith is trying to try a case that is not here, so that he may later confront Mr. Henkle with the statements made here in the trial of the other case.

Mr. Smith: I do not know what other case you are talking about.

Mr. Rynder: Gentlemen, it is common knowledge to people who have followed the Law Reports in this town that the stock yards company has brought suit against the railroads for collection of certain charges in its tariff, and Mr. Burgess, and Mr. Smith have been retained to defend the railroads.

Mr. Smith: Unhappily, you are in error, Mr. Rynder, be- [fol. 683] cause in both cases, you have in mind, Mr. Ernest

Ballard represents the Eastern Lines who are suing in that proceeding.

Mr. Rynder: I may be mistaken about that.

Exam. Carter: Gentlemen, here is an official of the stock yards company who has been an official of the company for 25 years. He is in an executive position with the company. He probably knows as much about the details of its affairs as any official connected with the company. Now, the Commission, in connection with this question, is interested in getting his views, and not necessarily the views of his attorneys. The Commission also, of course, would like to know the views of his attorneys in any proceeding before it, but after all, we are trying to get to the facts, and I think this witness should be in a position to know what the general policy of his company with respect to this particular question is, and he should be willing to testify to it. I think he should answer that question. Mr. Reporter, read the question.

(Question read.)

A. I am an operating officer of the company, and I——

Exam. Carter: Just a moment, please, Mr. Henkle.

By Exam. Carter:

Q. You can answer that question, can you not, Mr. Henkle? You have the knowledge to answer that question, have you not?

A. I have not.

Q. You have frequently stated what the policy of your [fol. 684] company was in other proceedings.

A. No, sir. I think you will find in my testimony in other proceedings, Mr. Examiner, it has been devoted exclusively to facts, and the physical operation of the property.

Q. I think you have stated what the effect of certain tariffs and so forth, was, and the way your company considered them in other proceedings. I may be mistaken about that, but my recollection is rather clear on it, that you have.

A. Well, I find that my recollection is faulty; in some cases, at least, Mr. Smith and I do not always agree on what we have testified to in previous cases.

Exam. Carter: I may be mistaken about that, but I have that distinct recollection.

The Witness: Well, it seems to me, Mr. Examiner, that his question leads me to a solution of all the problems in these 11,000 or 12,000 pages we have recently been going through to get the Secretary of Agriculture——

Exam. Carter: We are not talking about the Secretary of Agriculture.

The Witness: He was.

Exam. Carter: No, sir. That question which he addressed to you just now, which is pending, does not relate to any proceeding before the Secretary of Agriculture. That is my understanding.

Mr. Smith: Not at all.

[fol. 685] Exam. Carter: Read the question again, Mr. Reporter. Mr. Smith's explanation of the reason why he asked the question did relate to the Secretary of Agriculture. Read the question to the witness, please, Mr. Reporter, so that Mr. Henkle will have it in mind.

(Question read.)

Mr. Rynder: It seems to me, Mr. Examiner, if you will permit this objection before that question is answered, that Mr. Henkle answered that just a short time back. Mr. Henkle said they considered the alleys along the pen chutes part of the service they have provided in connection with loading and unloading, and depending on whether they were hard pressed for room, or not, it might include putting the live stock into a receiving pen as well as into the unloading pen. So, clearly, he has said that already.

Mr. Smith: He has said quite a few things. That is just what we are probing now. If he will just answer that question——

Mr. Rynder: I should say that what Mr. Henkle has already said is in accordance with my understanding of what he said at previous hearings, and the position I believe the stock yards has taken. Now, if Mr. Smith wants to pursue this question, he is trying to impeach his own witness, which I submit cannot be done.

Mr. Smith: I think, in view of the circumstances under [fol. 686] which Mr. Henkle is here, we should have an answer to the question. May we have an answer to the question, Mr. Examiner.

Exam. Carter: Do you have the question in mind? In other words, is it your view that you have received compensation, Mr. Henkle, for services——

The Witness: I have answered the question and stated that I had no views. He asked me if I had any views regarding the various facilities and services. I have no views as to what charges cover those particular services, or facilities.

By Exam. Carter:

Q. Have you a view as to whether or not you have received compensation for those particular services?

A. I have received it from some place, but the whole difficulty in these cases is that I do not know where I get it from.

Q. Have you actually seen the money? That is a slang expression, but I am trying to get your view as clearly as I can.

A. We have not received money for some of the services we claim money is due for. We have brought suit but have not received the money yet.

Mr. Smith: Mr. Henkle, let us see if we cannot understand each other.

By Mr. Smith:

Q. When you testified in the Hygrade case in response to questions from your own counsel, you drew a perfectly clear line between your unloading service and your stock yards service, some of the more acute litigation which you are now experiencing, not having started at that time. I have asked [fol. 687] you substantially the questions that your counsel asked you, and ~~with~~ reference to some of them you made some qualifications as to where one service stopped, and the other began. You made some statement, the record will show, as to whether or not the service beyond the unloading chutes, the driving of the animals over stock yards property either by some one else or by your own employes was a stock yards service or an unloading service. Now, are you taking any position here today, or are you willing to state where, in your view, or that of your company, the unloading service stops, and the facilities employed in that service come to an end, and where the stock yards service, and the facilities used in that service begin?

A. I have read the Supreme Court decision on it that said that the unloading service ends where the stock yards serv-

ice begins, and the loading service begins where the stock yards service ends, but that does not define the point to me. That is what I have been trying, during all of these years you have been asking me questions, to decide.

By Exam. Carter:

Q. Can you give us your opinion as to where the stock yards service begins, and unloading service ends?

A. In view of all of the conflicting statements, attitudes and opinions, I cannot give any statement as to where I think it begins, any more.

Q. You have previously expressed, in the past, such an opinion?

A. Yes.

[fol. 688.] Q. Then, subsequently, a conflict of ideas, and perhaps litigation——

A. And different tariffs.

Q. —have caused the confusion?

A. Yes.

Q. Which is your reason for not giving such an opinion now; is that correct?

A. That is correct, Mr. Examiner.

Mr. Smith: If that is your state of mind, why did you say a few minutes ago, or make some effort to say whether the driving service in the yards was under one, or whether it was under the other? Do you want to withdraw that?

The Witness: Let us go back to my answer, as to where I said that.

Mr. Smith: That occurred about a half hour ago, Mr. Reporter. Turn back to that, please.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

The Witness: My recollection is that I said in my earlier testimony this morning that the physical service of unloading might include taking the animals out of the pens and putting them into the holding pens.

By Mr. Smith:

Q. That is, you are saying now that certain animals are put in holding pens?

[fol. 689] A. Yes.

By Mr. Smith:

Q. That is, you are saying now that certain animals are put in holding pens?

A. Yes.

Q. With reference to the animals that are put in holding pens at the union stock yards by the stock yards employes, are you saying, or are you not saying that that is included on the one hand in the transportation service, or on the other hand in the stock yards service?

A. I do not know.

Q. Well, if you said previously that you did know, do you now withdraw that?

A. If the question were in the same form previously, I withdraw any answer different from the last one.

Mr. Smith: I would like to ask whether that point is perfectly clear to the Examiner. If it is not, I would like to pursue it a little bit further, as to what Mr. Henkle's position is on that point.

Exam. Carter: I understand from his testimony that he has no position at this time.

The Witness: That is correct, Mr. Examiner.

Exam. Carter: At this time.

The Witness: That is correct.

Mr. Smith: on that question.

The Witness: On that question.

[fol. 690] By Mr. Smith:

Q. Is that right?

A. Yes.

Q. Is the Examiner's understanding correct in that regard?

A. That I have no views in connection with that long question you asked me—yes.

Q. Is this a correct statement: The organization of the Stock Yards must be prepared to function at all hours, and must always be maintained at a point which will enable it to take care of the maximum amount of business?

A. That is correct.

Q. Is this a correct statement? Handling stock in this fashion, both as to unloading and loading service, and the yard service is the only thing that renders practical the receipt, sale and delivery in the Chicago market of the animals that are handled there daily?

A. That is correct.

Q. Is this statement correct: the Chicago market is now, and for many years has been, the largest and most important live stock market in the world?

A. That is correct.

Q. State whether or not it is true it has reached this development you have referred to only because live stock deliveries are concentrated and are handled in the manner which you have outlined.

A. That is correct.

[fol. 691] Exam. Carter: Let me ask just one question, Mr. Smith, if you will pardon the interruption.

Mr. Smith: Certainly.

By Exam. Carter:

Q. Have you been advised by your attorneys, the stock yards company attorneys, not to express any views on that question?

A. No, sir, I have not. I have not seen any of my attorneys, except to say "Good morning" to Mr. Tyler, since I returned from Washington. I left here, you will recall, on Tuesday, and upon returning came direct from the train here this morning.

Exam. Carter: Proceed, Mr. Smith.

By Mr. Smith:

Q. Is this a correct statement: As a result of the methods of handling live stock which have obtained in Chicago for the last fifty years, an essential speed in handling the traffic has been developed?

A. That is correct.

Mr. Smith: I am just interested in what your difficulty is, Mr. Henkle. Read the question to the witness, please, Mr. Reporter.

(Question read.)

By Mr. Smith:

Q. That is true whether you said it in the Hygrade case or not, is it not?

A. Yes.

Q. This speed is necessary if congestion and delays are to [fol. 692] be avoided. It permits the handling of live stock

in trainload lots, which could not possibly be done if deliveries were scattered. Is that a correct statement?

A. Yes, sir.

Q. Have you read the complaint in this case?

A. Yes, sir.

Q. Do you know what relief is asked?

A. Yes, sir.

Q. If this complaint were satisfied would it be necessary for the yard company to provide and maintain the same facilities—strike that, please. If this complaint were satisfied, would it be necessary for the yard company to provide and maintain at least as much in the way of facilities as it now maintains?

A. It seems to me it would.

Q. If the satisfaction of the complaint involved a smaller use or lesser use at any existing facilities, with a consequent reduction in revenue to the yard company from direct shipments, would the yards company voluntarily acquiesce in such a reduction in its revenue, or would it attempt to raise the charges to other persons using the yards, thus attempting to escape any reduction in its revenue?

Mr. Rynder: I object to that as being purely speculative.

By Exam. Carter:

Q. Do you know what the yards company would do?

[fol. 693] A. I do not know what position the yards company would take under a hypothetical condition.

Mr. Rynder: I want to point out to the Examiner that even if that speculation were permitted, that any charge the yard company can make as a yards company for stock yard services, under the Packers and Stock Yards Act is regulated by the Secretary of Agriculture.

Mr. Smith: But that could not include anything they did for the railroads, that was transportation service, could it, Mr. Rynder?

Mr. Rynder: No. What I mean is this——

Exam. Carter: The witness says he does not know.

Mr. Smith: Yes.

Exam. Carter: So, we do not need to go into that legal question, because it will not be answered.

By Mr. Smith:

Q. Under the circumstances I have outlined, you would insist that you must necessarily maintain the same facilities, would you?

A. I do not know whether we would or not.

Q. Well, how would they be different, could you say? That is, I do not mean the same facilities. There might be some additional facilities you would have to maintain; but, would you have to maintain at least all of the facilities you do now?

A. I could not say what facilities we would have to maintain under different conditions of handling animals, than [fol. 694] what we have now.

Mr. Smith: I apparently asked one question too many. I repeated the question I had asked you one moment ago, which was this:

By Mr. Smith:

Q. If this complaint were satisfied, would it be necessary for the yard company to provide and maintain at least as many facilities as it now maintains? You answered "Yes" to that, did you not?

A. Yes.

Q. Was that answer correct?

A. Yes.

Q. You do not desire to change it?

A. No.

Q. Are you unloading stock other than ordinary live stock at the Union stock yards, to some extent?

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. You never unload anything for exhibition purposes, or anything like that down there?

A. That is ordinary live stock. We do not have anything else but ordinary live stock for exhibition, other than for circuses, or something of that sort.

Q. Do you unload any circus stock down there?

A. No. They unload it themselves.

[fol. 695] Q. Where do you unload exhibition stock?

A. Part of it is unloaded in the main yards, and part of it is unloaded in the vacant lot immediately west of the amphitheater.

Q. In what volume does that come in?

A. Well, at the International, there are, perhaps 5,000 animals on that side of the yard, that are unloaded partly in the yards, and partly adjoining the amphitheater.

Q. What unloading facilities do you use in handling those animals?

A. We have portable chutes which can be rolled up to the doors of the cars to take the animals out of the cars, or trucks.

Q. Where do you get those?

A. Where did I get them?

Q. Yes.

A. I made six or eight of them at considerable expense and at times I have borrowed some portable chutes.

Q. From railroads?

A. From one railroad, yes, sir.

Q. Those that you borrowed were of the type that had been used for unloading on team tracks, were they?

A. I do not know where they had used them. I thought they were used in connection with exhibitions, such as ours. We had our own suitable chutes, except they were heavier and more difficult to handle than the ones we borrowed.

[fol. 696] Q. They are light, and they can be moved around, can they not?

A. They are lighter than ours. It takes power to move ours.

Q. These that you have used down there are the type that can be used to take live stock out of any car where you can spot the car on the track?

A. I should think so, yes.

Q. Now, you said that the live stock market——

A. Mr. Smith, let me say this: you could not unload double decks with them. They are only intended for the lower floor.

Q. Did you ever see any you could use on double decks, of the portable type?

A. All of our equipment for unloading from the second deck is portable.

Q. I see. You stated, did you not, that the live stock market maintained at the Union Stock Yards at Chicago is an important one?

A. Yes.

Q. Is it not true that broadly speaking that market is created and maintained by the sale of live stock by the pro-

ducers thereof, and the purchase of that stock by the packers?

A. By the packers and other buyers. Not all of the live stock is slaughtered that comes there, but it is maintained by buyers and sellers.

Q. Yes, I understand that. That is the reason I said "broadly". There is live stock purchased at the union stock [fol. 697] yards by traders, by local butchers, and by others than the packers?

A. Yes.

Q. That is so, is it not?

A. Yes.

Q. Now, I will ask you my question: is it not true that broadly speaking, and substantially speaking, the market is created and maintained by the sale of live stock by the producers thereof, and the purchase of that stock by the packers?

Mr. Rynder: Just by way of clarification, I suppose when you say that the "market" is maintained, you mean the market in the Union Stock Yard and Transit Company is so maintained?

Mr. Smith: I mean, the market at the Union Stock Yard and Transit Company.

Mr. Rynder: I just wanted to be sure you were not referring to the New York market, or some other market.

Mr. Smith: I intended to confine this to the Chicago yard, Mr. Rynder.

By Mr. Smith:

Q. Answer the question, please, Mr. Henkle.

A. I thought my qualification of the buying power on the market was only informative, that there are others. Of course, the buying of the packers is a very important feature, and I think I could agree with you that it is the main feature.

Q. In your opinion, is it in the interests of the live stock producers, from your experience, and in the public interest, that the market be maintained in full vigor?

[fol. 698] A. That is my opinion, yes, sir.

Q. Is it not true that at present the yard company imposes the same yardage charge on live stock arriving at the yards whether consigned and delivered directly to the packers, or purchased by them on the Chicago market?

A. That is correct.

Q. Would the elimination of a yardage charge on live stock purchased by the packers in the country, and consigned to the packers for direct delivery at the Chicago yards in your opinion, add to the incentive of the packers to purchase their live stock in the country rather than on the Chicago market?

Mr. Rynder: I object to the question. It calls for speculation by this witness. He is asking the witness to speculate on what it would induce the president of my company to do. I submit this witness cannot speculate on that. Secondly, I submit it is wholly immaterial.

Mr. Smith: I think it is material.

Mr. Rynder: We have a right as free citizens of these United States at the present time, to buy live stock where we so-and-so please, and it is utterly immaterial, even if the witness could answer the part of the question to which I just objected, whether it would produce that effect or whether it would not.

Mr. Smith: I think I can meet that objection. I will reframe the question.

[fol. 699] By Mr. Smith:

Q. Would the elimination of the yardage charge on live stock, purchased—or rather, let me put it this way: is it true that the elimination of the yardage charge on live stock coming in to the packers direct would make the charges against the packers on that live stock following, or resulting from the yard operations, less than on stock purchased on the open market at Chicago?

Mr. Rynder: I object. The witness cannot answer that.

Exam. Carter: Well, he is talking about charges accruing at the yards.

Mr. Rynder: Let me hear that question, Mr. Reporter.

Exam. Carter: You are talking about transportation charges, are you not, Mr. Smith?

Mr. Smith: I am talking about charges that accrue in the union stock yards under any tariff.

Mr. Rynder: Wait a minute. I would like to hear that question, so I can see whether or not that can be answered.

Exam. Carter: Read the question.

(The question was read.)

Mr. Rynder: Well, now, I would like to say why I think the witness cannot answer that except by pure speculation. We buy live stock on the open market out there. We buy it from commissionmen, and there is no charge whatever against us, yardage, or anything else. I think Mr. Henkle will agree with me that under the custom of doing business, [fol. 700] the commissionmen pay the yardage, and charge it back, so we do not pay that on stock we buy in the open market. As to what amount we will pay on a certain day for 100 hogs of a certain grade in the market depends on conditions that involve the whole economic structure——

Mr. Smith: I will withdraw the question. I think that is a fair criticism——

Mr. Rynder: —whether there is too much at Chicago, or too little, and every other factor that enters into the final making of prices of livestock at any given point.

Exam. Carter: Mr. Smith has withdrawn the question. Proceed.

By Mr. Smith:

Q. In your opinion, Mr. Henkle, from your experience and observation at the yards, what is your judgment, if any, as to the effect it would have upon the maintenance of the live stock market in Chicago, if yardage charges on directs were removed?

Mr. Rynder: I object to the question. We have had that question——

Exam. Carter: What effect would it have, on what, did you say?

Mr. Smith: The maintenance of the market.

Mr. Rynder: We have had that question brought out in suits brought by the commissionmen.

Mr. Smith: You must have had evidence there. Why [fol. 701] can't we get some here?

Mr. Rynder: The Commission ruled it was utterly immaterial, that it is a transportation practice, and they dealt with it. They sustained the concentration practices that were in effect, and said that an opinion as to what they might lead to in connection with the buying of live stock, was immaterial; that that was an economic thing that would flow its own way.

Exam. Carter: What is the question, Mr. Reporter.

(Question read.)

Exam. Carter: Are you qualified to answer that question?

The Witness: I have been testifying as a stock yards man. I neither buy nor sell.

By Exam. Carter:

Q. I say, do you feel you are qualified to answer that question?

A. I do not feel qualified to answer the question in that form.

Q. You do, or you do not?

A. I do not feel qualified to answer it.

Mr. Smith: Mr. Examiner, for the purpose of throwing as much light as it may upon the questions I have asked Mr. Henkle and the answers he has given, I ask permission within ten days to furnish a true copy of the direct examination of Mr. Henkle in response to questions by his counsel, Mr. Towner, in Docket 24375 Hygrade Food Products Cor-
[fol. 702] poration, versus the Atchison, Topeka & Santa Fe Railway Company, et al. I may say, if Mr. Rynder, or anybody else wants to offer a copy of the cross-examination of Mr. Henkle, I shall not object to it.

Exam. Carter: That permission will be granted.

Mr. Smith: I offer it for the limited purpose I have indicated, because of several reasons. There is some of it which is obviously immaterial to this proceeding, and there are other parts likewise relating to issues not in this case, upon which I do not solicit Mr. Rynder's concession, so I qualify the offer to that extent.

Exam. Carter: That may be understood.

Mr. Rynder: To the offer as a whole, I shall not object. It does contain testimony relating particularly, I think, to the facilities used by the Hygrade Company, and I would like the Examiner to keep in mind that that would not be relevant in this case.

Exam. Carter: No. As I understand it, it is offered for a special purpose, and I think we understand what that purpose is.

Mr. Smith: I would like to join Mr. Rynder in that observation.

Exam. Carter: I think we understand what the special purpose is for which it is offered.

Mr. Rynder: In order to save myself another job, within ten days—first, I should say, I have a copy of that trans-

[fol. 703] cript, and Mr. Smith has one. I should like, of course, to have both the direct and cross examination go in. I would like to save myself the trouble, as I shall be out of town, of having to get that up and mail it. Since we both have copies, why can we not stipulate the entire evidence of Mr. Henkle on direct and cross-examination, in this record?

Mr. Smith: I am making the offer I have made, and I have been given authority to do what I asked. If you want the cross-examination in, Mr. Rynder, inasmuch as my request has provoked that need on your part, if you want me to, I will have my people prepare also the cross-examination, if you want to offer that, and I will send it all together to the Commission.

Mr. Rynder: That is a very kind offer. I thought perhaps I could short-cut it a little bit by the mere stipulation of it, since we both have the record.

Mr. Smith: I want this in the record.

Mr. Rynder: All right. Under the circumstances, I would appreciate it very much if you would also copy in the cross-examination.

Mr. Smith: Very well. That will be done.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: We will recess until 1:30.

(At 11:30 a. m. Central Standard Time, an adjournment was taken until 12:30 p. m. Central Standard Time.)

[fol. 704] Afternoon Session, 12:30 p. m.

Exam. Carter: Come to order, gentlemen. You had completed the direct examination of Mr. Henkle, had you not, Mr. Smith?

Mr. Smith: Yes.

Exam. Carter: You may cross-examine.

Mr. Rynder: I have no questions of Mr. Henkle on cross-examination.

Mr. Blanchard: I have.

O. T. HENKLE, resumed, previously sworn and further testified as follows:

Cross-examination.

By Mr. Blanchard:

Q. Mr. Henkle, will you state the exact point at which these inbound shipments of animals are at the time you first receive possession of them from the inbound line-haul carrier for the purpose of unloading?

A. Our tariff says we unload them as the carrier's agent, and as the carrier's agent under that tariff, as soon as the train is pulled up to the platform, our men open the doors, break the seals, if necessary, and begin the work of unloading them across the platform and into the chute pens.

Q. Yes.

A. That is the first point at which we begin to handle the animals.

Q. So you take possession of them while the animals are [fol. 705] still in the car, standing on the tracks in the railroad car, in charge of that train?

A. No, I would not think so, while they are standing on the track, because we do not know yet what is in the car.

Q. You know as soon as you break the seal, or your employe goes into the car—he knows what is there, does he not?

A. No, not until we drive them out, and they are not counted as they come out, either.

Q. You drive them out, do you not?

A. Yes. We drive them out.

Q. You have to have possession of them to drive them out, do you not?

A. We have access to them.

Q. It is your employes who drive them out of the car?

A. That is correct.

Q. That occurs at a time when the car is standing on the railroad track adjacent to your unloading chutes, and the animals are in it, is that correct?

A. That is correct.

Q. Is that true of all the direct shipments that your company has handled in the past six or seven years, that that is where they were when you got them?

A. That is where the car was when we opened the car.

Q. The animals were in the car?

A. The animals were in the car. We took them out and [fol. 706] drove them into the receiving chutes.

Q. Now, prior to the delivery or tendered delivery of these direct shipments, does or have the consignees of them given you any orders as to the platform at which they should be unloaded, and the chute pen into which they should be unloaded, the pens into which they should be moved, or in which they should be held, the time that they should be unloaded or tendered for delivery, or made any other attempt to control the direct handling of the animals by you?

A. The consignee?

Q. Yes.

A. The consignee has not.

Q. After delivery, have the consignees of these direct shipments, particularly Swift and Armour, ever attempted to dictate to you by what route egress should be had for those animals?

A. No, sir.

Q. Now, is the volume of the charge you assess on these directs dependent upon the quantity of service that you render? By that, I mean this: was there any difference between the charge that you demanded on an animal that was accepted at the unloading chutes the minute it hit the ground and immediately driven away as compared with an animal that came down the chutes, stayed in a pen for an hour or two, perhaps, and was moved back to get out of the way and removed four or five hours later? Was the charge [fol. 707] the same or different on those two animals?

A. There would be no difference in the yardage charge.

Q. So you demanded the same amount from the consignee of these shipments, regardless of how much service was rendered?

A. Yes, sir.

Q. Now, Mr. Henkle, let me ask you this; at what time, after receiving possession of these direct shipments in the cars on the tracks, and after unloading them, do you first tender delivery thereof to the consignee, speaking first of shipments after 7:00 at night, before 7:00 in the morning?

Mr. Smith: Are you using the word "delivery" in any technical sense?

Mr. Blanchard: It is not so intended. I will change it.

By Mr. Blanchard:

Q. At what time do you first offer possession and access of the animals, to the consignee?

A. The consignee may have delivery at any time after unloading is completed into the chute pens.

Q. Has that been true as to Swift, Armour and Wilson, since May 25, 1933?

A. Yes.

Q. I want to refresh your recollection: do you recall on the morning of May 24th, 1933 when a conference was had in the office of your President, Mr. Leonard, at which you were present, Mr. Towner was present, Mr. Leonard was [fol. 708] present, and Mr. Kixmiller of Swift & Company was present, and I was present, concerning this subject matter?

A. Yes.

Q. Do you recall at that time both Mr. Kixmiller and myself advising you that beginning at midnight, 12:01 a. m., we would have at the unloading chutes a crew of drivers sufficiently large to accept every animal consigned to us when it hit the ground, or as soon thereafter as you chose to let us have them, and would immediately drive them away? Do you recall us giving you that information?

A. Yes.

Q. Will you state what Mr. Leonard's answer to us was at that time?

Mr. Smith: That is objected to as hearsay, immaterial, and not binding upon the defendants in this proceeding.

Mr. Blanchard: Mr. Leonard's answer, I mean, being the answer of the Union Stock Yard and Transit Company, of which he is president.

The Witness: While I was present?

Mr. Blanchard: Yes.

Exam. Carter: I have an objection here. I will sustain the objection.

Mr. Blanchard: Mr. Examiner, there has been a lot——

Exam. Carter: There has been a lot that has gone in, and I have usually sustained an objection when it was hearsay [fol. 709] testimony.

Mr. Blanchard: This is not hearsay testimony. This is a specific statement made in Mr. Henkle's presence from the stock yards company to Armour & Company, and Swift and Company.

Exam. Carter: What was the question? Did you ask him if he heard?

Mr. Blanchard: I asked him what reply Mr. Leonard made when he received that information.

By Exam. Carter:

Q. Did you hear Mr. Leonard make the reply?
A. Yes. I was there.

Exam. Carter: He may answer.

Mr. Blanchard: He told us, in effect, we would just as well save our time, did he not, because he would not let the men go over there——

Exam. Carter: Let him state what the reply was.

By Exam. Carter:

Q. What was the reply?
A. My recollection of the reply was that it was your intention that if you called for them to remove the animals without agreeing to pay us the yardage charge.

Mr. Blanchard: That is correct.

The Witness: And we said unless you would agree to pay us the yardage charge, it would not be any use for you to come over there and get them with your forces because we would not deliver them under those conditions, unless [fol. 710] you agreed to pay for it.

By Mr. Blanchard:

Q. The letters written, contained in exhibit 2, pages 105 and 106, dated May 24th, were written to record in writing the position stated, and the results reached in that conference, were they not?
A. That is correct.
Q. In the letter from the stock yards company to Swift and Company appears this statement: "It is also agreeable to us that it be understood that with respect to each and every of said shipments, the physical demand for delivery and for the right to promptly remove such stock without payment of such yardage charges is to be considered as having been made by you as soon as the stock is unloaded and refused by this company, immediately after unloading, and that such demand would have actually been made, but

for our advice to you that the same would be continuously refused."

A. That is correct. That is a correct statement of what was agreed upon at that conference.

Q. That was a correct statement that was contained in that letter to us?

A. Yes.

Q. As well as Swift and Company?

A. Yes.

Q. Now, prior to that time had either Swift and Company or Armour & Company ever offered to take 100 per [fol. 711] cent acceptance of their direct shipments at the unloading chutes?

A. I think there may have been times when their men were ready to take them at the chutes, if they needed them quickly.

Q. You say there may have been times. I asked you if they ever offered to take 100 per cent acceptance of all shipments?

A. No.

Q. At the unloading chutes?

A. No, sir, not before that time; not 100 per cent.

Q. So that was a difference which existed between the handling of the traffic now and traffic in 1931, that Mr. Smith interrogated you about, was it not?

A. That was a practical difference in the handling.

Q. Prior to that time, as to these other direct shipments—Mr. Smith seems to imply they have been made for decades, which I do not deny as far as Armour & Company is concerned—was it not the practice of the stock yards company to receipt for those animals as our agent, and to yard them and store them until we got ready for them—in other words, to practically render a yardage service after the transportation was over?

A. No. I think you are wrong in your statement that we ever acted as your agent in the matter.

Mr. Blanchard: Withdraw that question. Would the rest of it be true? Let me reframe it.

By Mr. Blanchard:

Q. Prior to May 25, 1933, was it not the general rule that a direct shipment that came in would be unloaded by you, [fol. 712] would be weighed, often fed, and usually stored

for anywhere from five hours to six hours, or more; and then would be brought over to us at our convenience, so that there was actually a yardage service apart from transportation, rendered on most of those shipments?

A. We did not bring them over to you.

Q. Did you not bring our cattle and sheep?

A. No.

Q. Didn't you ever bring hogs over?

A. No.

Q. I do not mean, bring them to the plant; you brought them to some place that was conveniently accessible to us?

A. We moved them out of the chutes, to locations that were convenient to us, rather than to you.

Q. And you held them there until we came and called for them?

A. Yes, at any part of the yards.

Q. We paid you the yardage charge on those, did we not?

A. Yes.

Q. Is it not a fact that today there are some direct shipments which we ask you to weigh, and which we ask you to hold sometimes overnight?

A. That is correct.

Q. Do we pay you yardage on that?

A. You do.

Q. Have we ever protested the payment of that yardage [fol. 713] where the service was rendered at our request?

A. Not under those conditions.

Q. The payments of yardage we have protested are limited, are they not, to these animals as to which we demanded delivery at the unloading chutes, and demanded the right to remove them without the payment of yardage?

A. I am sure that is correct.

Q. You have some arrivals inbound of live stock on Saturday, late Saturday afternoon, Saturday night, Sunday, and Sunday night, do you not?

A. A few, yes, sir.

Q. Is it the general practice for the consignee, whether he be a commissionman or a packer, to have drivers there to take charge of those animals that arrive during that week-end?

A. No. It is not the general practice.

Q. You cannot hold them in the unloading pens, can you?

A. No.

Q. You have no feeding or watering facilities there, have you?

A. No, sir.

Q. And if they arrive at any time after, say, 4:00 o'clock Saturday afternoon—what would be the time the commissionmen's drivers would go off duty?

A. I imagine noon Saturday; after noon, Saturday.

Q. If they arrive after noon on Saturday, and before 7:00 o'clock Monday morning, you cannot possibly hold these [fol. 714] animals in the unloading pens, be they cattle, hogs, or sheep, can you?

A. No.

Mr. Rynder: I would merely like to make this observation here on behalf of the complainants in this case, if there is any implication to be drawn from this last answer: we are not asking that the stock yards hold these shipments over Saturday afternoon or Sunday.

Mr. Blanchard: I did not mean that. I was asking Mr. Henkle a question as the basis for the refutation of the testimony of a previous witness to the effect that only 9000 out of 80,000 cattle, calves and hogs were taken from holding pens and not from yarding pens, in connection with Mr. Kemp's statement of that typical week. If you take the number of animals that arrived during that typical week between the hours Mr. Kemp and Mr. Henkle referred to——

Mr. Henkle: I did not make that statement about the 80,000 and the 9,000.

Mr. Blanchard: I know you did not. Another witness made the statement of that typical week, using what arrived on Sunday.

By Mr. Blanchard:

Q. You recall, do you not, Mr. Henkle, that this acceptance and the maintenance of this crew which we proposed to maintain at the unloading chutes to promptly remove the animals was a service that we proposed to maintain 24 hours a day seven days a week, 12 months in the year?

[fol. 715] A. That is my recollection of your statement.

Mr. Blanchard: That is all.

Exam. Carter: Are there any further questions?

Mr. Smith: Yes.

By Mr. Smith:

Q. Mr. Henkle, you answered several questions of the Examiner during my examination of you, and you have answered several questions since, in the examination of Mr. Blanchard, as to what if any change has occurred in the handling of directs back through the years.

A. Yes.

Q. Am I correct, now, in understanding that there has been no change in the physical handling of the animals except that now there may be fewer weighed by the yards than previously, and that apart from that the only change that has occurred is that you have received from the packers certain letters to which you have made reply, and that those letters are incorporated in exhibit No. 2 here and that you have had certain conferences with the packers which were to the same general effect as expressd in the letters?

A. Well, the practice of handling those directs has varied in the particular way that we have discussed here. In other words, a direct shipment now is more likely to be taken right from the chute, and we have no more to do with it than we did in the old days. But, in some cases if there is nobody there, nowadays we take the animals out of the chutes [fol. 716] and wait until they come. It varies. There is a general practice, but there are variations every day in particular cases.

Q. Well, now, the record contains a showing with respect to every car of directs received by Swift of which they took possession at the unloading chutes.

A. Yes.

Q. As I understand it, you say that what I have said in my question is true, except in years prior to the time covered by that exhibit, which was the last three years, Swift took even fewer cars at the unloading chutes than are shown in that statement, is that right?

A. No. I think the statement will show the actual handling conditions and will show just which car and what day of the week and what hour they took the directs.

Mr. Smith: You do not understand.

By Mr. Smith:

Q. That exhibit covers a certain period of time. As I understand you, in recent years more of these direct ship-

ments have been taken possession of at the unloading chutes than were formerly.

A. I am sure that would be correct.

Q. So we may understand, may we, that prior to the time covered by this exhibit, Swift and Company took possession of fewer cars relatively in relation to the whole at the unloading chutes than is shown in the exhibit?

Mr. Blanchard: Now, Mr. Henkle, let me ask you——

[fol. 717] Exam. Carter: Just a moment, Mr. Blanchard. Let the witness answer. Were you through, Mr. Smith?

Mr. Smith: Yes.

Exam. Carter: Let the witness answer the question.

Mr. Smith: I want the witness to answer the question.

Mr. Blanchard: I thought he nodded his head.

The Witness: I was not here when the exhibit was presented, but I understood that the exhibit showed car by car every shipment direct to Swift and Company that had been received during the period covered by the statement, and showed whether it was delivered direct to them at the chutes or whether it was delivered from some other point.

Mr. Smith: You are quite right about what the exhibit shows. Let us start from there.

Exam. Carter: Mr. Reporter, let us have the question read, and see if Mr. Henkle cannot answer it.

(Question read.)

Mr. Blanchard: I do not want to be construed as considering this material, because the fact is Swift and Company offered to accept 100 per cent at the chutes, and the reason they did not take them from the chutes is shown in this record.

Exam. Carter: That is subsequent to 1923.

Mr. Blanchard: 1933.

The Witness: 1933.

Exam. Carter: I mean 1933.

[fol. 718] Mr. Blanchard: It covers all of the period involved in the record.

Exam. Carter: Read the question again please, Mr. Reporter.

(Question read.)

A. It seems to me that would be correct, too.

By Mr. Smith:

Q. You cannot just be sure?

A. I could not be sure until I looked at all of the records.

Mr. Smith: All right. That is all.

By Mr. Blanchard:

Q. With regard to that exhibit and other exhibits offered by Mr. Hoffmann, Mr. Henkle, the carriers' witnesses testified—and I will ask the witnesses to check my summary of their evidence, and if it is incorrect, correct me before Mr. Henkle answers it; Mr. Hoffmann, it is particularly your statement I have in mind—anyway, the carriers' witnesses testified that the Stock Yards Company gave them certain records and as to some cars the word "Del." appeared opposite the car, which indicated delivery and the unloading chute; as to other cars no such notation appeared, which indicated delivery from some pen other than the chute into which the car was unloaded. Is it or is it not a fact, Mr. Henkle, that you regard and record deliveries as from the chute, even though your unloading gang for its own convenience and to make room for other cars may have moved the car back to a point adjacent to the unloading chute, before the consignee is even notified of arrival or the [fol. 719] animals are ever made available to him, or anything?

Exam. Carter: Answer that question first.

Mr. Blanchard: Mr. Hoffmann, did I correctly state what you testified to?

Mr. Hoffmann: Yes.

Exam. Carter: Well, let me ask you this: Is Mr. Henkle your witness for this purpose?

Mr. Blanchard: He is just bringing out exactly what Mr. Smith has asked him about in connection with these exhibits. I am following up what Mr. Smith brought out in his last questions.

Mr. Smith: I do not know but what we can make it a little easier than that.

By Mr. Smith:

Q. In this exhibit to which reference has been made, which is exhibit No. 32, we have shown the number of cars of which packers took possession at the unloading chute into which

the animals were unloaded from the car. Do your records show the unloading chute into which the animals were unloaded from the car?

A. Always.

Q. Do they show whether possession was taken of the animals there?

A. It seems to me without looking back at the original records that if it said "Delivered" opposite a car, I would understand from that, without further investigation, it was [fol. 720] delivered at the chute, because if it had been taken some place else, I would expect that the pen from which it was delivered would be added to the word "Delivered".

Exam. Carter: You have said that is your understanding. We have a definite statement from Mr. Hoffmann that such is the case. I think we have a statement from him that he made an investigation to determine that fact.

Mr. Smith: Mr. Henkle covered that specifically.

Mr. Blanchard: Perhaps I can ask him the question in another way.

Exam. Carter: Read his answer.

(Answer read.)

Exam. Carter: Do not say "it seems".

By Exam. Carter:

Q. What is the fact, if you know it? Do you know what the fact is?

A. When the record shows only the word "Delivered", that means to me it was delivered at the chute and that it had not been yarded in a holding pen. Does that agree with the——

Mr. Blanchard: I will accept that. I think that is the truth.

By Mr. Blanchard:

Q. With the congestion you have described, Mr. Henkle, around that area, I believe you have something less than 300 pens available at the present time for unloading, is that correct?

A. Chutes.

[fol. 721] Q. Yes.

A. Yes.

Q. You load outbound shipments from the same place, do you not?

A. That is correct, at this time.

Q. You have testified that all Sunday arrivals are taken away from the chutes and put in the yards, and the record already shows that sheep are taken from the unloading chutes, practically all of them——

A. To the sheep house.

Q. To the sheep house?

A. Yes.

Q. By the stock yards employees?

A. That is correct.

Q. Would you say that it would be possible that out of a total year's receipts of some 81,000 or 82,000 cattle, calves and hogs, that all but 9,000 of them were taken at the unloading chutes?

A. I could not say that without referring to the records.

Q. You know that all sheep are not taken, and you know that Sunday arrivals are not taken there, is that not true?

Exam. Carter: Mr. Blanchard, he said he could not say. He does not know.

Mr. Blanchard: I will drop it.

Exam. Carter: There is no use of pursuing it.

Mr. Blanchard: That is all.

[fol. 722] Exam. Carter: Are there any further questions?

By Mr. Smith:

Q. Mr. Henkle, do we have this straight, then, that as far as the physical handling of these directs is concerned, there has been no change throughout the years with two possible exceptions, that there may be some variance in the extent to which directs are weighed on the stock yards scales and there may be some difference in the extent to which consignees take possession of those animals at the unloading chutes as distinguished from the holding pens; does that cover it?

Exam. Carter: You have so testified, have you not?

Mr. Blanchard: He testified to another thing, too.

Exam. Carter: Just a moment.

Mr. Blanchard: That there was a difference on May 25, 1933, in that the packing companies at that time offered to take 100 per cent.

Mr. Smith: I am talking about the actual physical handling, now. I am definitely eliminating anything you brought up.

Mr. Blanchard: You are eliminating who is responsible for the handling?

Mr. Smith: Yes.

Mr. Blanchard: That is a perfectly clear question.

The Witness: A perfectly clear answer is, I believe it does.

Mr. Smith: The answer is what?

The Witness: Read the question, and I will answer it.

[fol. 723] Exam. Carter: Read the question.

(Question read.)

A. My answer was "It does".

Mr. Smith: Thank you.

By Mr. Blanchard:

Q. You have in mind, do you not, Mr. Henkle, that on many shipments which are weighed on the stock yards scale, many direct shipments, you are paid yardage by the packer consignee and no question is ever raised about it where that weighing is done at its direction?

A. That is correct.

By Mr. Smith:

Q. Some of the commission firms have employees present over the week ends who take delivery of the animals, have they not?

A. Some of them have.

Q. But the packers do not?

A. I do not think they have.

Mr. Smith: That is all.

Exam. Carter: Are there any further questions?

By Mr. Blanchard:

Q. That is not the general rule, for commission men to have drivers there, or employees, over the week ends?

A. No; I said "in some cases".

Q. As to the same commission men, that is not a universal practice, is it?

A. No.

Q. They have them there one particular week end to take [fol. 724] care of a particular shipment they know is coming, and the next week end they may not be there at all, is that correct?

A. That is correct.

Mr. Smith: I understand that is not correct, but I am not going to press it.

Mr. Rynder: Is everybody through for a moment, now?

Exam. Carter: It appears so.

Mr. Rynder: I want to ask a question.

By Mr. Rynder:

Q. With reference to this exhibit No. 32, Mr. Henkle, that Mr. Kemp prepared, I believe you are familiar generally with it, are you not?

A. Yes.

Q. Merely by way of illustration, I call your attention to page 12, or indeed to any other page which shows certain stock apparently taken possession of by Swift and Company at the unloading chutes—that is, certain taken possession of at the chutes——

A. Yes.

Q. —and certain taken possession of at other pens.

A. Yes.

Q. I simply want to ask you if that is in part due to the convenience of the stock yards company, having in mind this morning that you said sometimes the animals were—or rather, conditions were such that the animals could be taken possession of in the chute pens, while at other times owing to the movement of traffic the unloading crew moved [fol. 725] them immediately to a holding pen?

A. Well, you might describe it as being for the convenience of the stock yards company, but it is to facilitate the movement of the livestock in the best interests of everybody.

Q. Well, I was not asking you to state as to 100 per cent of these. I mean, in some cases it might be that the stock yards did that to facilitate delivery?

A. That is correct.

Q. And in other cases it might be because Swift and Company did not have anybody there?

A. That is correct.

Q. In other words, from that mere record you cannot determine which falls in which category?

A. No. I do not see how you could.

Mr. Rynder: That is all.

The Witness: This shows what was actually done, but does not show the reason why.

Mr. Smith: That is quite interesting.

By Mr. Smith:

Q. It may be, then, in some instances where there were Swift employees there to get the stock, due to the manner in which this stuff has to be handled and the congestion in the yards, the only efficient way it could be done would be to put it in other holding pens, is that what you are saying?

A. I think that is a correct interpretation.

Mr. Smith: That is what I understood Mr. Rynder to be [fol. 726] developing.

The Witness: That is a correct interpretation, if I understand it.

Mr. Smith: All right. That is all.

Exam. Carter: Are there any other questions? You gentlemen are all through with Mr. Henkle, now, are you?

Mr. Smith: Yes.

Exam. Carter: You may be excused.

(Witness excused.)

Mr. Smith: I have here several copies of this statement of the Department of Agriculture, Mr. Examiner. Was that given an exhibit number yesterday?

Exam. Carter: No.

Mr. Smith: I would like to have an exhibit number assigned to it now.

Exam. Carter: The next exhibit number is 38.

(Defendants' Exhibit No. 38 marked for identification.)

Mr. Smith: Has that been received?

Exam. Carter: Exhibit 38 will be received in evidence.

(Defendants' Exhibit No. 38, received in evidence.)

Mr. Rynder: Wouldn't this please Mr. Smith in that connection? I have a document bearing the label "United States Department of Agriculture, Bureau of Agricultural

Economics, Livestock Meats and Wool Market Statistics and Related Data, 1936", compiled under the direction of [fol. 727] Edna M. Jordan, assistant agricultural statistician, dated Washington, D. C., April, 1937. Page 65 of that document shows the receipts at Chicago from 1920 through 1936, showing also the percentage that came for sale and the percentage that did not come for sale, but direct to packers. I was wondering if we might agree that I have a sufficient number of copies of that section made and file it with you as promptly as possible?

Mr. Smith: There is no objection to it on our part. Is the statement self-explanatory?

Mr. Rynder: I offer it now to you for examination. The only reason I do not offer the entire document is that it covers every place in the United States.

Mr. Smith: Let me see if it needs any explanation. I do not think it does. You are just offering this as to hogs?

Mr. Rynder: Sir?

Mr. Smith: You are just offering this as to hogs; this is just hogs?

Mr. Rynder: All of the cattle, hogs and sheep are shown in that.

Mr. Smith: Let him find that, while I offer a few other things.

Mr. Rynder: All right.

Mr. Smith: Mr. Rynder, will you make a statement with reference to what we have discussed?

Mr. Rynder: Mr. Examiner, respecting exhibit No. 19, [fol. 728] Mr. Smith talked to me during the lunch hour and said that he had tried through the railroads to get some similar livestock contracts, which was quite difficult because of their method of accounting, but they dug up one which shows the address as "Swift and Company, Union Stock Yards, Chicago." I believe the testimony of Mr. Tally was to the effect that the billing was as per exhibit 19 unless the directions given by the Chicago office were not followed either by an outside shipper to us, or even by one of our own employees. It would obviously take a lot of time to get up all of these bills. It could not be done during the present hearing. My first offer to Mr. Smith was this, that we would try to assemble all of the bills during this reparation period and that after looking at them we could jointly report to the Commission that, let us say, 500 were billed

one way and 600 another way, or whatever it might turn out to be. He suggested, as I recall it—and this is subject to correction—that it would be satisfactory to him if I would stipulate here that shipments were billed both ways, the relative number at this time being unknown to us. I am willing to stipulate that.

Mr. Smith: That is all right with me. I do not think it is material, but the one bill that they happen to be able to locate in the Chicago area showed the other way, and I think the record ought to indicate it.

Exam. Carter: It is understood that the stipulation is [fol. 729] agreed to.

Mr. Rynder: I can imagine that later on some time in the proceeding the exact number billed each way may become important. I rather deem the stipulation sufficient for the present time.

Mr. Smith: I want now to offer very short excerpts from the record in the Hygrade case and from Mr. Rynder's brief on behalf of Swift and Company in that case. It has some bearing, I think, upon some of the evidence in this case. The excerpt from the brief is simply entitled "Excerpts from Brief on Behalf of Intervener, Omaha Packing Company in Hygrade Food Products Corporation vs. Atchison, Topeka & Santa Fe Railway Company, et al., Docket No. 24375." I ask that that be received in evidence as exhibit No. 39.

Exam. Carter: It may be received.

Mr. Smith: Is that received, Mr. Examiner?

Exam. Carter: Exhibit 39 will be received.

(Defendants' Exhibit No. 39 received in evidence.)

Mr. Smith: I now would like to also offer in evidence——

Mr. Rynder: Which one was that?

Mr. Smith: 39.

Mr. Rynder: The excerpts from the brief?

Mr. Smith: Yes. I also offer a certified copy of a portion of the transcript in the same proceeding, which covers either in part or fully, I do not recall which, the testimony of Mr. [fol. 730] Watson, one of the assistants to the freight traffic manager of Swift and Company, a witness put on the stand by Mr. Rynder. I offer that in evidence as exhibit No. 40.

Exam. Carter: It may be received.

(Defendants' Exhibit No. 40 received in evidence.)

Mr. Smith: I might say, Mr. Examiner, that these documents bear upon the possibility of handling animals in public streets, lawfully, under the ordinances of this city. I offer them because it has appeared to the defendants that in any way that they might be handled here on complainants' theory, there would be some handling of the animals in a public street. Mr. Rynder, I have investigated and I find that the ordinance that you put into the record in the Hygrade case is still an effective ordinance in the city of Chicago. Will you concede that?

Mr. Rynder: I do not know. That Hygrade case was tried in 1931. I have not looked it up.

Exam. Carter: Read Mr. Smith's statement, Mr. Reporter.

(Record read.)

Mr. Rynder: My answer was "I do not know". That was in 1931. I have never investigated it since.

Mr. Smith: Well, are you willing to accept my word for it? I do not think I have to offer the ordinance in the record anyhow. I have offered it for convenience through your witness' showing. I will say to you that Mr. Thomas, my associate here, has looked into that, and he has found that [fol. 731] ordinance is in effect in Chicago. Are you willing to accept that statement, or do you want him sworn?

Mr. Rynder: No; I will accept that statement, just as though he had been sworn.

Mr. Smith: Is that true, Mr. Thomas, that it is in effect?

Mr. Thomas: That is right.

Mr. Smith: I now desire to offer certified copies of the decision of the Secretary of Agriculture in certain proceedings. The first is a certified copy of the Findings, Conclusion and Order in Bureau of Animal Industry Docket No. 450, the Secretary of Agriculture versus the Denver Union Stock Yard Company, respondent, issued under date of February 17, 1937. I am not sure it is necessary to put into the record decisions of the Secretary of Agriculture, but to be on the safe side I have decided to do it, Mr. Examiner. I offer this as an exhibit.

Mr. Rynder: 41?

Mr. Smith: 41.

Mr. Rynder: Until I know some reason for it, I am objecting.

Mr. Smith: I will tell you the reason for it. I am going to offer this and several others, and the reason for it is this: the Secretary of Agriculture has conducted the same character of proceedings which he is now engaged in conducting in Chicago, to which reference has already been made. He has [fol. 732] conducted those proceedings to a conclusion with reference to the St. Joseph yards, the Denver yards and Omaha yards. In every one of those proceedings, as these documents which I will offer will show, the Secretary of Agriculture as it was necessary for him to do, has drawn a clear line between transportation services and the point where they end, and stock yards services and the point where they begin. He has put on one side the services and facilities involved in one, and put on the other side of the line the services and facilities involved in the other. The Secretary of Agriculture has drawn that line at the unloading chutes, and in these instances which I am referring to here he has included in the subject matter of which he has taken jurisdiction the yardage of all directs and in making up his rate base the record will show that on the basis of the per car charge he has used as a predicate for his rate base, he has included services and facilities involved in the handling of direct shipments and his rate base is based upon them. Now, following those decisions by the Secretary of Agriculture, they were taken to court. The St. Joseph decision was contested before a three judge court and then taken to the Supreme Court of the United States. The Omaha decision was decided by a three judge court. The Denver decision was tried by a three judge court and taken to the Supreme Court of the United States. In every instance there was a contention on the part of the carriers that confiscation was [fol. 733] resulting from the order. It was necessary for the courts to pass upon the question of whether or not proper services and facilities had been included by the Secretary of Agriculture in the subject matter over which he took jurisdiction. The Secretary of Agriculture has been sustained in every one of these decisions by the courts, in the St. Joseph case by the Supreme Court of the United States, and in the Omaha case by a three judge court from which no appeal was taken, and in the Denver case by the Supreme Court of the United States, Monday of this week.

Mr. Rynder: Tuesday.

Mr. Smith: If it is not taking too much time, I may for convenience call your attention to certain things the United

States Supreme Court said in its decision Monday of this week.

Mr. Rynder: Should we not delay that a little bit? It is hardly the time for argument.

Mr. Smith: I thought you objected on the ground they were immaterial, and wanted to know how they could be material.

Mr. Rynder: I think you have gone into that sufficiently for me to make my answer. You will find in every one of these cases the services—and I believe in the Denver case there was no different charge on directs than on others; in other words, the situation is just like Chicago—have been predicated upon the stock yards service performed upon those directs. We are here trying to avoid that stock yards service. We are here trying to avoid using their alleys, [fol. 734] pens, runways and scales. In each of those decisions—and I believe there was no differentiation between directs and others—they were fixing a charge for stock yards service involving alleys, runways, overhead passages and everything of that kind, the very thing we are trying to get away from and not use at all. The Secretary in no case fixed a charge for mere egress from the yards, nor did he even consider it, discuss it or mention it. It is upon that theory I thought they were immaterial. I presume the Examiner would like them to go in here. I would like to have him look them over in connection with that objection.

Mr. Blanchard: Furthermore, Mr. Examiner, there is no showing here made that anybody at Denver, St. Joe or Omaha made any such attempt to avoid the use of these yardage services and facilities, nor demanded the right to get out and nothing else, from the carriers, as Mr. Henkle testified in this record, where such service is rendered by the stock yards company and yardage charges—at least by these two companies—are paid without any protest.

Exam. Carter: I will receive the exhibits subject to the objections. You may note an exception.

Mr. Rynder: This first one, Denver, is what?

Exam. Carter: 41.

(Defendants' Exhibit No. 41 received in evidence.)

Mr. Smith: I am a little short of copies of this next decision, which relates to the Omaha yard. I have three.

[fol. 735] Exam. Carter: I can do without one, because one will be in the record.

Mr. Blanchard: I will waive my copy. I have a copy of that in my office.

Mr. Smith: Do you want one, Mr. Rynder?

Mr. Rynder: I have one somewhere.

Mr. Smith: You say you have one?

Mr. Rynder: I would like to have you give me one if you can. I would like to have a complete set of exhibits in this case.

Mr. Smith: Mr. Examiner, I would like to offer in evidence as exhibit No. 42 a certified copy of the Proceedings, Findings of Fact and Order in Bureau of Animal Industry Docket No. 344, Secretary of Agriculture v. Union Stock Yards Company of Omaha, Ltd., respondent, issued under date of March 1, 1933. I offer that as exhibit 42.

Exam. Carter: The same objection, Mr. Rynder?

Mr. Rynder: I would like to make the same objection. I would like to be allowed time to offer an objection.

Exam. Carter: Yes.

Mr. Rynder: I would like to ask that everything I stated as an objection to exhibit 41 be considered as repeated as an objection to exhibit 42, with this additional point, that at Omaha the loading and unloading service is not performed by the stock yards, as the tariffs of the Commission will [fol. 736] show, but is performed by a railroad company which I believe is called the South Omaha Terminal Railway Company. You have had before you within a year or two a case involving the loading and unloading charges of that railroad, so that the situation there discussed in addition to what I said about Denver is different in that respect from Chicago.

Exam. Carter: I will admit exhibit 42 subject to the same objection and the remarks which you have made. You may note an exception.

(Defendants' Exhibit No. 42 received in evidence.)

Mr. Smith: We now offer in evidence as exhibit No. 43, a certified copy of the Findings, Conclusion, and Order issued under date of May 4, 1934, in Bureau of Animal Industry Docket No. 298, Secretary of Agriculture v. St. Joseph Stock Yards Company, respondent. Can you get along without a copy of that?

Mr. Blanchard: I will waive a copy.

Mr. Rynder: Give me just a moment on this, please.

Mr. Smith: Certainly.

Mr. Rynder: I ask your indulgence for a moment. To save time, I ask that it be considered I have repeated in connection with exhibit 43, all of the objections made in connection with exhibit 41, and I want to call attention to this fact in this exhibit as showing a further dissimilarity: in that case the Secretary of Agriculture in paragraph 44 included all of the loading and unloading chutes and facilities, income [fol. 737] and expense in his stock yards facilities, and as used and useful for stock yards purposes.

Mr. Smith: Which one was that?

Mr. Rynder: That is in exhibit 43.

Mr. Smith: St. Joe?

Mr. Rynder: Yes; paragraph 44, page 18.

Mr. Smith: I think he discussed that in one of his later decisions, did he not?

Mr. Rynder: So, the preponderance here on that point is two to one. Take your pick.

Mr. Smith: I think you will find he discussed that in the later decision and took a different position on it.

Mr. Blanchard: That was affirmed by the Supreme Court of the United States.

Mr. Rynder: That was affirmed by the Supreme Court of the United States.

Mr. Smith: We will thresh that out in the unloading case.

Exam. Carter: Exhibit 43 will be received in evidence subject to the objections Mr. Rynder has stated. You may note an exception.

(Defendants' Exhibit No. 43 received in evidence.)

Mr. Smith: I should like to have the reporter make part of the record certain statistics contained in Agricultural Statistics, 1937, of the United States Department of Agriculture. Just in brief, these statistics show for the years [fol. 738] 1927 to 1936 the number of cars of livestock—I should say, rather than "cars", the number of head of livestock received at the nine principal stock yards of the country, and also the number of head received for the same years at all others. I am offering this showing, subject to the reservation that the record shows I have made, as bearing upon the tariffs offered by Mr. Rynder, the fact being that none of the thirteen tariffs he referred to are published by any market which ranks in the first nine markets, or what the Secretary refers to as the first nine markets. If the

Examiner please, I would like to have these tables made part of the record. I am referring to the one that is headed "Table 336", and relates to cattle and calves, receipts at public stock yards, 1927 to 1936, appearing on page 248, just that particular page that covers the table for cattle and calves; also a similar statement for hogs, which is embraced in table 351 and entitled "Hogs, receipts at public stock yards 1927 to 1936" on page 261; and also a similar table for sheep and lambs shown on page 275 of the publication, and table 373 thereof which is headed "Sheep and lambs, receipts at public stock yards, 1927 to 1936." This is a public document. I offer this of record.

Mr. Blanchard: Mr. Smith, let me ask you this: would it suit your purpose as well to have that copied, and send copies to all parties? I will waive any objection to your furnishing it within 10 days or 15 days or any time you want.

[fol. 739] Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. It is understood that Mr. Smith will furnish these statements to the Commission within 10 or 15 days, whichever suits your convenience, Mr. Smith, and will furnish copies to the other parties. Do you have a statement to make with respect to that, Mr. Rynder?

Mr. Rynder: Mr. Smith, are you entirely through with that?

Mr. Smith: I was going to talk to Mr. Henkle about this showing. Are you just going to offer hogs or offer it all?

Mr. Rynder: The trouble is, since we have gone through it, we find it does not give any information as to any other livestock, so I would like to offer it as to hogs.

Mr. Smith: I have not any objection.

Mr. Rynder: What I am offering here, Mr. Examiner, to be furnished perhaps within 10 days—Mr. Smith, I am not intending to include the other points.

Mr. Smith: I understand.

Mr. Rynder: What I am offering is the table on page 65 bearing the heading, "Hogs—Direct Receipts By Packers, and Numbers and Percentage of Total Receipts 1920-36, Chicago", contained in a document entitled, "Livestock Meats and Wool Market Statistics and Related Data, 1936", published by the Department of Agriculture, dated "Washington, D. C., April, 1937".

[fol. 740] Exam. Carter: Gentlemen, let me say this on

the record: I would rather give you 20 days to file this information that is to be furnished, or until such time as is necessary after you receive the record, because it would help me a whole lot if you could refer to the page number of the record at which that was to be furnished.

Mr. Rynder: I will try to have them get it up rather promptly, and then send it in after I have the record so I can give you the page number.

Exam. Carter: So, we will understand if it is 20 days——

Mr. Smith: That is to be furnished immediately after the receipt of the record?

Exam. Carter: Yes.

Mr. Smith: There is one question I think I would like to ask Mr. Tally, in view of something Mr. Rynder said. You may just answer it from where you sit, Mr. Tally. I think you must have called Mr. Rynder's attention to the fact that at St. Joe the Secretary included there, contrary to my statement to the Examiner, the unloading facilities.

Mr. Rynder: Now, let me say this——

Mr. Smith: Is that right?

Mr. Rynder: Let me suggest this, Mr. Smith——

Mr. Smith: I would like to develop the fact.

Mr. Rynder: You do not give me credit for anything, Mr. Smith. You say that Mr. Tally must have suggested that [fol. 741] to me. I was the attorney for the St. Joseph Stock Yards Company in that case, and the only witnesses were witnesses for the government and employees of the St. Joseph Stock Yards Company and Mr. Tally was not present and I do not know that — ever read the decision. I did manage to think that up, Mr. Smith.

Mr. Smith: I have done you a great injustice, Mr. Rynder, for which I apologize. I will ask you, sir, whether the tariff before the Secretary of Agriculture at St. Joe covered the loading and unloading charge?

Mr. Rynder: I do not now recall whether they published it in the tariff, or whether—my impression is, Mr. Smith, that it was a contract between the railroads and the stock yards which was not published in tariff form by either one.

Mr. Smith: You do not think Mr. Tally could give any further information on that?

Mr. Rynder: No. I think I can.

Mr. Smith: All right.

Mr. Rynder: I think I can.

Mr. Smith: As to whether or not it was in the tariff—can you give me any further information about that?

Mr. Rynder: As I say, my recollection is it was not in the stock yards tariff, but if you want any further information, it is this: the line haul carriers to St. Joseph published that allowance to the stock yards in their line haul tariff.

Mr. Smith: Well, I thought it might be interesting to [fol. 742] know what the basis was in the record before the Secretary of Agriculture, which caused him to handle that point differently from the way he did at Denver and Omaha and the way he may do here at Chicago.

Mr. Rynder: It would be impossible to furnish that without the entire record. May we go off the record, Mr. Examiner?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Smith: That is all I believe I have, except one matter, Mr. Rynder spoke to me about. He and I are going to confer further on that, and discuss it the next time we meet.

Mr. Rynder: That is the matter of that contract.

Exam. Carter: Mr. Rynder, you understand that Mr. Kidwell is to furnish a legend for exhibit No. 1. You and Mr. Smith will look that over before it is actually sent in. Is that the understanding?

Mr. Rynder: Yes.

Mr. Smith: Mr. Rynder, I have not received a copy of exhibit 1 as changed by Mr. Kidwell.

Mr. Rynder: Neither have I.

Mr. Smith: Will you undertake to get those for us?

Mr. Rynder: Yes.

Exam. Carter: There should be some additional markings on it. For instance, one vacant space would be marked as [fol. 743] "Area No. 1", "Area No. 3", or "Area No. 4", in red.

Mr. Smith: The mere legend would not help me, unless I have the map to go with it.

Exam. Carter: Mr. Kidwell should mark both your copy of exhibit No. 1, Mr. Rynder, and Mr. Smith's copy in the same manner that he has marked these other copies. If it should happen he does not have any copy marked and does not remember, if you will write to me I will send you my own copy, and we can handle it that way.

Mr. Rynder: I do not think we will have any trouble arranging that with Mr. Kidwell.

Mr. Tyler: Mr. Henkle can do it for you anyway.

Mr. Rynder: This might be on the record: the request I had made for a copy of a contract was that mentioned at the top of page 332, volume 213 of the Commission's reports, where it says "Under an agreement with the Junction, the trunk lines entering Chicago were granted trackage rights over the railroad" and so forth. Mr. Smith informed me this morning he had very kindly tried to get that, and had had reports from several railroads that there was no such contract. I think it may have some bearing on this case. I was wondering, Mr. Smith, if perhaps those railroads were thinking of the contract in connection with loading and unloading?

Mr. Smith: No, they were not. I might amplify that a little bit. Mr. Rynder got the impression from that that [fol. 744] there were probably some written contracts. When I got back to the office last evening I found I could not get any of these railroad people. The first thing this morning I called the Illinois Central people, because they are making more team track deliveries here than anybody else, which, on Mr. Rynder's theory that such a contract existed, would be in conflict with the contract, and I talked to Mr. Jenner and he told me he was sure there was no such contract. I told him I would have to have something more than that, that he would have to make a complete search and let me know. He said he would do that: I also called Mr. Westbrook, comptroller of the Northwestern, because my recollection is that they have the next largest unloadings on team tracks. Mr. Westbrook told me the same thing. I asked him to make a check and advise me immediately. They called after I left and talked to Mr. Kenneth Burgess. Mr. Burgess wrote me a note which I have shown to Mr. Rynder, in which Mr. Burgess said he had covered the matter with those two railroads fully, and there was no written contract; that the contract is an oral and exceedingly informal one, and that I think it was the North Western had one letter in their files some years ago that dealt with a change in the right, and that that is the only thing in writing they had on it; and that there was no provision in the letter, and there was no oral understanding between those roads and the Junction or anybody else with respect to what Mr. Rynder

[fol. 745] discussed yesterday. I have gone as far as I can, to the extent I have gone.

Mr. Blanchard: Would you be interested in knowing where the contract is? There is a written contract. I have seen it, and read it. I know where it can be found in a public record.

Mr. Rynder: I have not seen it, as Mr. Blanchard has, but I have been informed on the highest authority, which ought to know of its existence, that it does exist.

Mr. Smith: If you will tell me between what parties any such assumed contract exists——

Mr. Blanchard: I will tell you off the record.

Mr. Smith: I say, if you will tell me between what parties such a contract exists, I will try to get it. You did not tell me that yesterday, and I have asked the two people who make the largest number of team track deliveries.

Mr. Blanchard: I understand it is filed as an exhibit in proceeding 542 before the Secretary of Agriculture. Is that right, Mr. Tyler?

Mr. Tyler: 472.

Mr. Blanchard: 472.

Mr. Rynder: Do you happen to have the exhibit number, Mr. Tyler?

Mr. Blanchard: I do not know that that is the contract I have seen.

Mr. Smith: I do not know a thing about it. If it is in that record, it is as available to you as it is to me. I will under-[fol. 746] take to get anything you have asked me to get.

Mr. Rynder: If it is in the record, I will ask Mr. Tyler to show me the courtesy——

Mr. Tyler: Let us go off the record.

Mr. Smith: We can discuss it next week when we meet in Washington.

Exam. Carter: That will be satisfactory. Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. Is there anything further?

Mr. Rynder: I want to assure Mr. Smith of my utter faith and sincerity, and if I do find such a document I will bring it to his attention.

Mr. Smith: I will not object to its being put into the record if it has any materiality to this case.

Exam. Carter: Does that complete the defendants' case?

Mr. Smith: Except for——

Exam. Carter: I mean, at this hearing?

Mr. Smith: Yes.

Mr. Rynder: I want to ask just one or two questions in rebuttal. I would like to call Mr. Reneker back to the stand.

Exam. Carter: Very well.

W. T. RENEKER was recalled, having been previously sworn, resumed the stand and testified further as follows:

[fol. 747] Direct examination.

By Mr. Rynder:

Q. Mr. Reneker, there was some testimony yesterday about congested street traffic in the neighborhood I think of 42nd Street and the stock yards. Are you acquainted with that condition?

A. I am acquainted with that district and any traffic that there would be on that street. I never have known of any particular congestion.

Q. Do you travel that street frequently?

A. Very frequently.

Q. Is that the customary route by which you move hogs from the Omaha Packing Company into your plant at the stock yards?

A. It is.

Q. Do they encounter any more delay in transit than that which is occasioned by the stop lights on that street?

A. Practically none. They flow with the regular traffic that is flowing there. I would not call it any delay.

Q. Do you think a few more trucks moving up and down that street would cause any traffic difficulties?

A. No, sir. It is a good broad street.

Q. Now, if the access accorded you was such as that you have described, where the livestock would come out to Emerald Street, as the nearest practicable approach to a public street—is there any congestion at all on Emerald?

A. There is practically none there. There is very little [fol. 748] traffic on Emerald Avenue. Union Avenue, the next street over, is the one that carries the heavy burden of traffic in that area.

Q. As it looks to you from time to time, does Emerald Street appear to be practically void of traffic?

A. Practically, yes.

Q. Is there any congestion of traffic on 39th Street which parallels the stock yards property on the north, from Ashland to Halsted?

A. No, sir. I would not call it congestion. I think it moves very orderly and keeps moving all the time.

Q. And rapidly?

A. Up to the limit of the law, which is 25 miles an hour.

Q. Now, as to those streets immediately around the stock yards such as Emerald and certain other small streets there, regardless of what the ordinances of this city may be, are they commonly used without interference by the city for driving hogs over to those small plants?

A. They are.

Q. Could you give some illustrations?

A. They are used not only for hogs but other species of livestock, too.

Q. Could you give some illustration of that?

A. The Agar Packing Company drives hogs out through that entrance across to Union Avenue to their holding pens, some of which are under the old elevated line structure, [fol. 749] directly opposite their plant on the west side of the street.

Q. There has been some testimony by Mr. Henkle showing the past arrivals of livestock, both directs and otherwise and others, at the unloading chutes of the Union Stock Yards during the night and into the early morning, and indicating that the livestock must be moved promptly out of the unloading chutes in order to make way for the use of those unloading pens by additional trains being placed at the same spot. Can you say whether or not it would have been possible for you during the past, under our demands, and whether it would be possible for you in the future, to remove that livestock by your own employees from the unloading chutes over any egress that may be designated, as fast as it arrives?

Mr. Smith: After all, you did ask all these questions and they were all answered. Mr. Ryndor. I do not object to it, except it has been asked and answered.

The Witness: I will say that we can handle it if afforded the opportunity at any hour of the day or night or any time.

By Mr. Rynder:

Q. In whatever quantities you receive them?

A. In whatever quantities we receive them. I might qualify that by the fact that the railroads let us know, if we ask, what time trains arriving will arrive at the yards, or approximately what time, that will carry our inbound shipments. We may know we have a shipment that would be due at 2 o'clock, or 3 o'clock or 5 o'clock, and that there [fol. 750] would be nothing prior to that, so it would not be necessary, no matter what the congestion would have been prior to or after that, to be there; but, if it were necessary to be there and we could not get that information, we would have gangs available all night to handle anything that would be there, and all day, too.

Mr. Rynder: That is all.

Mr. Smith: I have no questions.

Exam. Carter: Are there any further questions?

(No response.)

Exam. Carter: You are excused, Mr. Reneker.

(Witness excused.)

Exam. Carter: Is there any further rebuttal testimony?

Mr. Rynder: No. That is all.

Exam. Carter: You gentlemen do not want to fix a date for the filing of briefs now, I take it. Would you rather to it now, or on Tuesday?

Mr. Rynder: I rather think that could be postponed. I would rather it be postponed, if possible.

Mr. Smith: Until Wednesday.

Exam. Carter: Until Wednesday, I mean.

Mr. Smith: Until Wednesday?

Mr. Rynder: Yes.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record. It is my understand- [fol. 751] ing it is the desire of counsel to have this hearing adjourned until Wednesday, June 8th, at 1 o'clock P. M. at my office for the purpose of taking the testimony of Mr. Cleveland for the defendants, and any rebuttal testimony to Mr. Cleveland's testimony that the complainant may desire to offer. Is it also my understanding that you gen-

tlemen do not want to furnish any other testimony than the direct testimony of Mr. Cleveland, and any rebuttal testimony that may be considered necessary?

Mr. Rynder: I have no further testimony to offer. I would like the record to show just how that arise. I am not particularly desirous of going there Tuesday.

Exam. Carter: You mean Wednesday.

Mr. Rynder: Yes, Wednesday. Mr. Smith found it would be difficult to produce Mr. Cleveland in Chicago, and as it seemed I would in any event be in Washington that day, I agreed with Mr. Smith that I would appear at that time for that purpose.

Mr. Smith: That is correct.

Exam. Carter: You understand it is Wednesday.

Mr. Rynder: Wednesday.

Exam. Carter: Wednesday at 1 o'clock P. M. at my office.

Mr. Rynder: Yes.

Exam. Carter: I want to thank counsel for both sides for the manner in which they conducted their case for the consideration which they have shown to the Examiner.

Mr. Rynder: I want to thank the Examiner for his patience.

[fol. 752] Mr. Smith: On our part, I want to thank you, Mr Examiner. I think at times we combined to make your task rather difficult, and we appreciate your patience and courtesy.

Exam. Carter: Thank you. This hearing will be adjourned until 1 o'clock P. M. at my office in Washington, D. C., on June 8th, 1938.

(Whereupon, at 2 o'clock P. M. Central Standard Time, June 4, 1938, adjourned to June 8, 1938, at 1 o'clock P. M., at the offices of the Interstate Commerce Commission, Washington, D. C.)

[fol. 753] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 27862

SWIFT & COMPANY, et al., Complainants,

vs.

THE ALTON RAILROAD COMPANY, et al., Defendants

Hearing Room D, I. C. C. Building,
Washington, D. C.,
Thursday, June 9, 1938.

The above entitled matter came on for further hearing, pursuant to adjournment, at 1.00 o'clock p. m.

Before:

Examiner P. O. Carter.

Appearances:

(The same as heretofore noted.)

[fols. 754-755] PROCEEDINGS

Examiner Carter: This case, Docket No. 27862, as partly heard in Chicago last week, and adjournment was taken on June 4 for the purpose of taking additional testimony in Washington. That adjournment originally was until yesterday, June 8th, at one p. m., but was postponed, due to Mr. Rynder's unavoidable absence from the city, until today at one p. m.

Will the parties state their appearances again in this part of the record?

Mr. Rynder: R. D. Rynder for the complainants.

Mr. Smith: Kenneth M. Burgess, Robert Thomas, and Douglas F. Smith for defendants. Mr. Burgess and Mr. Thomas are not present today.

Examiner Carter: You may proceed, Mr. Smith.

Mr. Smith: Mr. Examiner, perhaps I should say that, while I have just stated to the reporter that Mr. Burgess, Mr. Thomas and I appeared for the defendants, we appear not for all of the defendants, but for those which I named at the previous hearing.

A. F. CLEVELAND was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.
A. A. F. Cleveland.
Q. Where do you live?
[fol. 756] A. Washington, D. C.
Q. What is your occupation?
A. Vice President of Traffic, Association of American Railroads.
Q. How long have you held that position?
A. Since November 1, 1934, at which time the Association was organized.
Q. Prior to that time you were associated for many years with the Chicago & Northwestern Railway Company?
A. Yes, sir.
Q. Where were your headquarters at that time?
A. Chicago.
Q. When did you begin your association with the Northwestern?
A. July 1, 1898.
Q. Was your experience with the Northwestern largely in the Traffic Department?
A. It was exclusively in the Traffic Department, except as I incidentally came into contact of course with the other departments; but my assignment has always been in the Traffic Department.
Q. You worked up from a subordinate position in the Traffic Department through the various grades to become Vice President of Traffic of that Company, did you?
A. Vice President of Traffic, of Rates and Divisions.
Q. And you held that position at the time you left the [fol. 757] Northwestern and went with the Association of American Railroads, did you not?
A. Yes, sir.
Q. During the period that you were with the Northwestern did you have occasion to become familiar with the rate structure on live stock, namely, the rates applying from other stock yards to Chicago and from country points to Chicago?
A. Yes, sir.

Q. Over what period of years did you have that familiarity with those rates?

A. From a general office standpoint from about the middle of 1912 until I left at the end of October, 1934.

Q. When you began your duties with the Northwestern that involved some responsibility for the making of rates in general, but particularly with reference here to live stock rates was it necessary for you to ascertain from other officers of the company, who had carried that responsibility on in the years prior to your assumption of it, what elements it was necessary to compensate for in making rates on live stock to Chicago?

A. Yes, sir, not only from other officers but also from old records.

Q. The rate structure on live stock which you found in effect when you first assumed responsibility on behalf of that company with respect thereto in 1912 or prior thereto, [fol. 758] was that a rate structure that was largely a voluntary rate structure of the carriers themselves?

A. Yes, sir.

Q. Are you acquainted with the fact that at the present time and for a very great number of years the Union Stock Yards and Transit Company has assessed and collected from the packers so-called yardage charges on live stock transported by rail to Chicago consigned directly to the packers and taken possession of by the packers at the Union Stock Yards and Transit Company at Chicago?

A. Yes, sir.

Q. Do you know whether there is now or has ever been any increment in the line haul rates on live stock assessed by the trunk line carriers who take live stock into Chicago for delivery to the Union Stock Yards which covers or compensates the railroads for any so-called yardage service or responsibility for the performance of yardage service at the Union Stock Yards?

Mr. Rynder: I object to that question, Mr. Examiner.

Examiner Carter: Objection sustained.

Mr. Rynder: The basis for that objection is that the rates in effect were prescribed by the Commission from the west up to Chicago in Docket 17000, Part 9; the rates from points in Official Territory were prescribed by the Commission in what is known as Eastern Live Stock Case, of which I can [fol. 759] give you the citation later.

Mr. Smith: I am going to withdraw that question, Mr. Rynder, if that will satisfy your objection.

Examiner Carter: I was going to suggest that you break down your question.

Mr. Smith: I want to withdraw that question, if I may.

By Mr. Smith:

Q. Mr. Cleveland, over the period of your service with the Northwestern did you have occasion to serve on various so-called rate committees of the trunk lines moving live stock into Chicago, which committees were engaged in the study of live stock rates to Chicago?

A. I did.

Q. What was your first association with a committee of that character?

A. My first association with a committee of that character, if you mean a general consideration of the live stock rates in the Western District, was on a committee of which Mr. C. E. Spens, then Assistant Freight Traffic Manager of the Burlington Railroad, was the Chairman. The Committee was formed as the result of notice from the Commission instituting an investigation of the live stock rates. I cannot give you the exact period, but I would say that was about 1914 or 1915. That was a Committee that included the entire Western District and was composed of representatives from the Western Trunk Lines, the Southwestern Lines, and the Far Western Lines. The Commission had taken a great many formal complaints that had been pend-[fol. 760] ing and consolidated them with this investigation. This Committee was particularly appointed to present the views of the carriers as to what the rates should be on various species of live stock and their products, as I recall them, and Mr. Spens was the Chairman thereof. That Committee met frequently for a period of two or three months. We succeeded in harmonizing the views of the various sections of the Western District. We worked up an entire new adjustment of live stock rates for the Western District and also a basis of rates for the products, and we had intended to present that as the carriers' view as to what the adjustment should be when this investigation was set for hearing. In other words, we were trying to evolve a constructive defense.

That Committee made a report to the traffic executives,

their report giving the reasons for our proposals and explaining them in detail. That report was approved——

Q. Mr. Cleveland, in connection with that study may I ask, was it necessary to make, an- did you and your associates at that time make a thoroughgoing analysis of the elements that were covered by the existing live stock rate structure to Chicago and the elements which should or must be covered by a proper rate structure?

A. Yes, sir.

Q. In your consideration of what the proper rate level should be did you give any weight to or make any allow- [fol. 761] ance for any services which I might characterize as yardage service on direct shipments of live stock at the Union Yards?

A. We did not.

Q. Why did you not?

A. Because we did not think it was a proper element to take into consideration, one in which the railroads were not interested, one in which they did not participate in the revenues derived therefrom; or, in other words, it was none of our business.

Q. And you incurred—when I say "you" I mean the railroads that were represented in this Committee—you incurred no expense in connection with the performance of that service?

A. That is correct.

Q. Now, did you subsequently serve on other committees of that same character and, if so, will you please tell us now something about their consist and their work?

A. Yes. I want it to be understood that I am only dealing with the general situation. Of course it was a weekly occurrence that I was attending meetings of officials where live stock rates on some portions of the system might be under consideration, but the next general——

Q. (Interposing) Right along that line, live stock has always been an important commodity for the Northwestern, has it not?

A. Very important. For many years the Northwestern [fol. 762] was the heaviest delivering line of live stock at the Chicago Stock Yards. It was the heaviest delivering line of live stock at Omaha. It was the second heaviest live stock line in the entire Western District, the Burlington being first, but the Burlington served certain markets that the Northwestern did not serve.

The next general committee that I was assigned to work with was a committee that was known as the Johnson Committee, of which Mr. S. H. Johnson, at that time Vice President of the Rock Island Railroad, and member of the Chicago Western District Committee under Federal Control, was Chairman. That Committee was formed under the instructions received from the Director of Traffic of the Railroad Administration, Mr. Chambers. He asked to have a study made and a recommendation offered as to a constructive general readjustment of the live stock rates in the Western District. A great deal of spade work having already been accomplished in connection with the so-called Spens Committee report, the Johnson Committee took the Spens Committee report and reviewed it and made some changes therein which they thought changed conditions warranted, but basically it was along the same lines as the previous report, and that report was approved by the Western District Committee and submitted to Mr. Chambers. For some reason no rate advice was ever issued in connection with it and it never became effective.

[fol. 763] Q. Were you an active——

A. (Interposing:) Let me explain what I mean by "rate advice".

Q. Yes.

A. During that period of Federal control we could not change the rates without obtaining the authority from Mr. Chambers' organization. So that in any changes in rates we might desire to make, we made a report to Mr. Chambers' organization and obtained our rate authorities to proceed.

Q. Were you an active participant in the deliberations and the work and the action taken by that Committee?

A. Yes, sir.

Q. Now, following that, Mr. Cleveland, did you head the Committee of railroad rate men who studied the live stock rate structure in connection with the investigation by the Commission in Docket 17000, Part 9?

A. Yes, sir, I was the Chairman of the Traffic Committee.

Q. And the Traffic Committee presented to the Commission in that proceeding a scale of rates on live stock for application from points of origin generally to Chicago and elsewhere, did it not?

A. Yes, sir.

Q. And did you have charge of the work as a result of which that scale was constructed and presented?

A. I did. I was Chairman of the Committee that did the [fol. 764] work, and I participated in all the meetings that the Committee had; yes, sir.

Q. Through appearance on the witness-stand by testimony you presented that scale on behalf of the carriers to the Commission, did you not?

A. Not "that scale"; those scales.

Q. Those scales—several scales?

A. Yes, sir. That Committee, like these other committees, was formed of representations from the various parts of the territory, such as the Western Trunk Line, Southwestern, etc. The northern lines, such as the Great Northern and Northern Pacific, were not in either of those groups. We first had to form our ideas as to fundamental bases, and when that had been accomplished we devised scales that were appropriate for the several territories. Now, that does not mean it was the same scale throughout the entire Western District. There were several scales that we proposed, and I think the highest scales in some parts of the territory were fully justified as compared with other parts of the territory.

Q. Did you include in the scales which your Committees constructed any increment or allowance to cover so-called yardage service on direct shipments of live stock consigned to the packers at the Union Stock Yards in Chicago?

A. We did not.

Q. Did any carrier representative take any position in the [fol. 765] proceeding that the Commission ought to include in the line haul rates any increment to cover such a service?

A. They did not; neither did any protestant interest.

Q. Are you able to say, based on the experience and observation that you had, whether there is any increment in the line haul rates on live stock to Chicago which covers or compensates for or is designed to cover or compensate for the performance of yardage service on these direct shipments into the Union Stock Yards at Chicago?

Mr. Rynder: I object to that question.

Examiner Carter: I will let him express his opinion.

Mr. Rynder: May I state my objection before you overrule me?

Examiner Carter: Yes, sir.

Mr. Rynder: First, that, as we can show by the reports of the Commission, the live stock rates into Chicago have been prescribed by the Commission in two reports. Unless Mr. Cleveland sat with the Commission in its deliberations in fixing those rates, nobody could answer what increment, if any, is in those rates, because it was not explained by the order of the Commission. Indicate what reports you refer to.

Mr. Smith: 17000, Part 9, two reports, in the Eastern Live Stock Case, of which I have not the citation, but I guess we all know it; 165 I. C. C., I think. And it is immaterial in this case, because the complainant is not asking the railroads to furnish yardage services at 45 cents on cattle, 15 [fol. 766] cents on hogs, and 10 cents on sheep, but to furnish them a mere egress from the unloading point.

Examiner Carter: I will overrule the objection and allow the witness to state his opinion. Of course that is simply his opinion. As you say, he does not know what the deliberations of the Commission were, or the basis upon which they actually reached their decision.

Mr. Rynder: I note an exception.

Examiner Carter: An exception will be noted.

(The reporter read the pending question as above recorded.)

The Witness: I am.

By Mr. Smith:

Q. Will you state your opinion on that, please?

A. There is nothing in the rate covering yardage charges, and I would like to state why I answer that way.

Q. State that, please.

A. I am talking now about the rates which resulted, as I understood your question, from 17000, Part 9.

Q. Yes.

A. In the first place, there could have been nothing in the rate to include those services because in the first instance the rate as set by the Interstate Commerce Commission only covered services to the terminal of the line haul carrier, and there was a plus charge beyond. Now, since the rate itself did not go to the Union Stock Yards, obviously there [fol. 767] could not have been anything in that rate for yardage service. And another reason why there could have been

nothing in the rate for yardage service is the simple fact that there was nothing in the record in regard to yardage charges, either by the carriers or the shippers or their representatives.

Mr. Rynder: I object to that of course as not being the best evidence, as to——

The Witness: I will call attention——

Mr. Rynder: Just a moment—as to there being nothing in the record, a record that would half fill this room.

Examiner Carter: Did you hear the record made, Mr. Cleveland?

The Witness: I heard all of the record, I think. I know I was at Chicago a couple of times and at Ft. Worth and at Denver.

Mr. Rynder: I can shorten this. If the Examiner is going to let this in, regardless of the best evidence rule, I do not want to lengthen this hearing, because——

Examiner Carter: I will let him state his recollection, and that is all it amounts to, anyhow. The record is the best evidence.

Mr. Smith: I think there is some practical limitation upon the application of the best evidence rule, and it is obviously impractical and impossible to put that record in this proceeding, and I think it is perfectly proper for the witness, with the contact with the case that Mr. Cleveland had, to [fol. 768] state his opinion as to what is in the record, subject to being rebutted.

Mr. Rynder: I do not think the burden can be put on me, by that stretch of the best evidence rule, of rebutting an opinion of what is in the record. This is putting upon me the burden of producing the record.

Examiner Carter: I won't pass on the effect of this evidence. It is a question of the weight to be given to it. I will permit Mr. Cleveland to complete his answer. You object to it on the ground it is not the best evidence. The objection is overruled and you note an exception.

The Witness: As I stated, the rate did not carry to the Union Stock Yards. It only carried to deliveries on the inbound line.

Examiner Carter: Would you like the reporter to read as far as you had gone with the answer?

(The reporter read as follows:)

"And another reason why there could have been nothing in the rate for yardage service is the simple fact that there was nothing in the record in regard to yardage charges, either by the carriers or the shippers or their representatives."

The Witness: I think I heard all of the testimony involving rates to Chicago. I know positively that there was no railroad witness, being Chairman of the Committee and knowing what they were to cover; that there is no testimony as to the yardage charges being used as an element in con-
[fol. 769] nection with determining a proper rate.

By Mr. Smith:

Q. Mr. Cleveland, the complaint in this case asks the Commission to require the railroads to make such arrangement as may be necessary with the Union Stock Yards and Transit Company——

Mr. Rynder: I beg your pardon, Mr. Smith——

Mr. Smith: Let me finish and then if you think there is a material difference as between what I say and the allegations of the complaint, we can thresh that out. Will you read what I have said?

(The unfinished question was read by the reporter.)

Q. (Continuing:) —to deliver direct shipments of live stock consigned to Swift & Company and unloaded at the Union Stock Yards to take possession of that live stock at the nearest public street to the point at which it is unloaded.

The witnesses for the complainant have stated that what they want is egress for this stock out of the yards; that the rail carriers who bring the traffic into Chicago may at their option take the stock at the unloading chutes and bring it out and turn it over to the complainant at the nearest public street or that the complainant will go to the unloading chutes and get the stock and itself drive the stock out over the property of the Yards Company to the nearest public street.

The alternative requests made are that the railroads pay for the driving of the animals from the unloading chutes to
[fol. 770] the nearest public street, and also give such compensation to the Yards as may be necessary to compensate them for the use of the facilities over which the stock is driven to the nearest public street, or in the alternative to

make such compensation to the yards as may be necessary for the use of the facilities in driving the stock over the public streets, with the understanding that so far as the service of driving the animals is concerned from the unloading chute to the nearest public street that will be performed by the complainant.

Now, assuming that that is a reasonably accurate and adequate statement of the relief that is asked here, I will ask you whether there is anything in the line haul rates on live stock to Chicago, in your opinion, which would compensate the line haul carriers for, or would be designed to compensate the line haul carriers for, that additional expense that would be involved in this handling after the stock has been unloaded at the Union Stock Yards, which I have described?

Mr. Rynder: I desire to object to that question upon the ground that it does not accurately represent either the prayer of the complaint or the requests made by any of my witnesses at Chicago. I think it is clearly brought out by my witnesses that we are making no request at all, and that the question, therefore, is not based upon an accurate description either of the complaint or the testimony of the witnesses. Obviously the best evidence of that is readily ac- [fol. 771] cessible. Here is the complaint.

Mr. Smith: All right. I will ask the witness to read the complaint. May I borrow this copy?

Mr. Rynder: Yes. (Handing document to Mr. Smith.)

Mr. Smith: May we have a short recess while the witness reads this complaint?

Examiner Carter: We will take a short recess.

(A brief informal recess was here taken.)

By Mr. Smith:

Q. Mr. Cleveland, have you, because of the objection made by counsel for the complainants, acquainted yourself during the intermission that has been allowed here with the relief that is sought in the complaint filed in this proceeding?

A. Yes, sir.

Q. Will you state, please, whether in your opinion there is any increment or coverage in the general rates on live stock from all destinations to Chicago that would compensate the rail haul carriers for, or is designed to compensate the rail haul carriers for, the expense that would be

involved in the handling of the live stock requested or prayed in this complaint?

A. There is not.

Mr. Rynder: The same objection, Mr. Examiner, that it is a conclusion of the witness.

Examiner Carter: The same ruling.

[fol. 772] Mr. Rynder: Exception.

Examiner Carter: Exception noted.

By Mr. Smith:

Q. Do I understand you to say that there is nothing in the rate to cover this cost?

A. That is correct.

Mr. Smith: I think that is all.

Examiner Carter: Let me ask just a couple of questions. Is the line haul rate prescribed to Chicago in 17000, Part 9, the same when delivery is taken at some point other than the Union Stock Yards as it is when delivery is taken at the Union Stock Yards? I am talking about the line haul rate under the scale.

The Witness: The line haul rate under the scale is the same, but originally when the decision came out, Mr. Examiner; the line haul rate only applied to the terminal of the inbound line, and that was plussed by the Chicago charge at the Junction Railway. Now,——

Mr. Rynder: I beg your pardon, Mr. Cleveland. That was not the charge at the Junction Railway. That was simply a plus charge.

The Witness: It was a plus charge. Now that charge was attacked by the Chicago Stock Yards, as I remember it, and it was decided in favor of the carriers at one time. Then at a later time the case was reheard, maybe it was a new petition, but in any event finally the plus charge was taken off, [fol. 773] so that the rate which originally only carried to the terminal of the line haul carrier now does apply to the stockyard pens.

Examiner Carter: Now was the situation the same with respect to the rates of the Eastern lines?

The Witness: The Eastern lines, according to my recollection—now, I have not seen this tariff in a long, long time, but according to my recollection the Eastern lines' Chicago

rates applied from the pens. The Eastern lines did not have the plus charge such as the Western lines had on outbound traffic.

Mr. Rynder: Mr. Examiner, I think the witness, according to my best information, answered erroneously, and perhaps we could stipulate what the facts are on the record. As I understand it, the Eastern lines had a plus charge of $1.35.

Mr. Smith: He said it was different.

Mr. Rynder: He said they had no plus charge.

The Witness: It was a different situation. There were some cases where they had no plus charge.

Examiner Carter: Off the record.

(Discussion off the record.)

Examiner Carter: Mr. Reporter, read the answer of the witness to my question.

(The answer of the witness was read as above recorded.)

By Mr. Smith:

Q. Do you have a clear recollection as to the last point that you adverted to, as to whether or not on shipments [fol. 774] outbound over Eastern lines that plus charge does apply?

A. I am not clear on that.

Q. Now can you answer categorically this question: Leaving aside the terminal charge, for illustration the $2.20 charge on shipments by the Western lines, leaving that aside for the moment, was the scale of rates prescribed by the Commission in 17000, Part 9, and the scale proposed by you the same for application to the Union Stock Yards as for application to the team tracks in Chicago?

A. No, sir, we had a plus charge to the Union Stock Yards—used the same scale to get to Chicago—and if it went to the Union Stock Yards there was a plus charge of $2.20 for it to get delivery.

Examiner Carter: That has been eliminated?

The Witness: That has been eliminated, and for the Chicago delivery of the line haul carrier the plus rate applied.

Mr. Smith: Thank you.

Examiner Carter: Off the record.

(Discussion off the record.)

Mr. Smith: Mr. Rynder, you said you thought the witness had answered erroneously with respect to one question. As I understand it, you were referring to the question whether there is a plus charge of $1.35 applicable on shipments outbound from the Union Stock Yards over Eastern [fol. 775] lines, as to which Mr. Cleveland has now subsequently stated that he could not express an opinion. Is that correct as to what you had in mind?

Mr. Rynder: Yes.

Examiner Carter: You may cross-examine.

Cross-examination.

By Mr. Rynder:

Q. Mr. Cleveland, what was covered by the yardage charges to which Mr. Smith has referred in his direct questions?

A. I have seen many of those bills of sale. Do you want them, and things of that kind?

Q. I mean that——

A. Where they have the commission on them, and yardage charges and freight charges and things of that kind. I never looked into what those charges covered.

Q. I am not trying to go into that. I merely meant that you said that there were some charges in cents per hundred pounds or per head made by the Stock Yards Company.

A. That is correct. I never was interested——

Q. All right. Do you know whether the railroads have made any effort to determine how much, if anything, it would cost them to afford the shipper egress from the unloading pens at Chicago to the nearest point, or to the point that might be designated?

A. I do not know that they ever made such an effort.

[fol. 776] Q. The rates finally in effect to Chicago, unless there has been some minor exception to that, are the rates prescribed by the Commission from the West in Docket 17000, Part 9, and from the East in the Eastern Live Stock Case, to which I have heretofore referred?

A. That is correct, and there are lots of exceptions, with the great body of truck competitive rates from here to Chicago, even before I left Chicago.

By Mr. Smith:

Q. There is the Manker scale which is generally in effect. That is substantially lower?

A. That is a substantially lower scale, with exceptions in Wisconsin, as I recall it.

Mr. Rynder: It is published under an expiration date.

The Witness: That is correct. Well, there are a lot of rates, Mr. Smith, in addition to the Manker scale.

Mr. Smith: I see.

By Mr. Rynder:

Q. Mr. Cleveland, you were not present at the Chicago hearing, so I will ask you to make this assumption: That one of the exhibits in evidence, which is the tariff of the Union Stock Yards and Transit Company of Chicago, provides a $3 charge per car for the services of that company as carrier's agent in furnishing such facilities and services as the carrier may be required to furnish in effecting delivery of the shipment. Have you followed me on that?

[fol. 777] A. Yes, sir.

Q. Now, if that $3 charge of the Stock Yards made against the rail carriers were in turn by the rail carrier added to its present rate to the unloading chutes, the railroads would not be out a nickel, would they?

Mr. Smith: That is objected to as calling for a conclusion of the witness, and as being incompetent and immaterial.

Examiner Carter: I sustain the objection and note an exception.

Mr. Rynder: I will see if I can get that another way:

By Mr. Rynder:

Q. If any amount that you were required to pay by the Stock Yards were added to the amount assessed against the shipper of direct shipments, would the revenue of the carriers be affected?

Mr. Smith: Just read that question: You are assuming, I suppose, that the railroads get this amount that is assessed, but you don't say that.

(Question read.)

The Witness: If it was assessed and collected, obviously the revenue would be exactly the same as it is today.

Mr. Smith: Assessed and collected by the railroad?
The Witness: Yes.

By Mr. Rynder:

Q. I mean that; added by the railroad and collected from the consignee of the direct shipment.

A. Yes, sir; it would be just the same as it is today.

[fol. 778] Mr. Rynder: That is all I have.

Examiner Carter: Any redirect?

Mr. Smith: No.

(Witness excused.)

Examiner Carter: Mr. Rynder, you will recall that in Chicago I agreed to attempt to get a copy of the proposed report of Examiner Brooke, No. 472. Now they advise me that they have one or two typewritten copies available, but they have also told me that the Stock Yards Company has had that report printed and has distributed a great many copies, some of which they have received. Now I just wondered whether or not—have you got a typewritten copy, Mr. Smith?

Mr. Smith: I have a copy that I obtained under these circumstances: Through local counsel I first attempted to get a copy of this document, and it was refused, on the ground that it was the practice of the Secretary not to give copies to anyone other than the respondent. I later wrote to the Secretary of Agriculture a rather long letter stating my reasons why I thought he ought to give me a copy of this report, and he finally sent me a copy of it, and in the letter of transmittal which accompanied it he referred to this rule, and asked me not to make the document public. It was for that reason that I made no reference to the document at the hearing until a reference to it was made by Mr. Rynder, at which time I said I objected to a part of the [fol. 779] report going in unless it was all put in. Now that copy that I have is the only one I have, and I have it under the inhibition that I have referred to. I have no objection to the report being in, and I think it ought to be in.

Examiner Carter: Now let me ask you about this: That is a typewritten copy?

Mr. Smith: Yes, that is a typewritten copy. I have been advised that the Stock Yards had the report printed. I first asked the Stock Yards for a copy of the report and was advised that they had a very poor carbon of it, and would

be unable to give me a copy. Subsequently, however, I found that they had had it printed.

Examiner Carter: What I have in mind is this: Mr. Rynder, do you think you could obtain for the record a printed copy of that report which would be received after that printed copy had been verified or checked with the copy that you received direct from the Secretary or with the copy that Mr. Rynder may have received from the Secretary of Agriculture?

Mr. Smith: We can agree on the accuracy——

Examiner Carter: It is just this, that the Secretary's office has advised me by telephone that the Union Stock Yards and Transit Company had that report printed, and, to use their words, that the report has been widely circulated. Now, I just simply make this request because it will be easier if I can get hold of a printed copy of this report [fol. 780] rather than request it from the Secretary of Agriculture, although he said they have got a copy available, and undoubtedly will be willing to furnish it.

Mr. Rynder: I would like to say a word off the record to the Examiner and Mr. Smith before I give a formal answer on the record.

(Discussion off the record.)

Mr. Rynder: Mr. Examiner, I will make an effort to obtain a copy of the proposed report in B. A. I. Docket 472 which is said to have been printed by the Union Stock Yards and Transit Company, and if I can obtain it for the purpose of filing in this record I shall submit it to Mr. Smith for examination before it is submitted.

Mr. Smith: If Mr. Rynder fails in his efforts I will ask the Examiner to take the other course.

Examiner Carter: You will notify me promptly whether you are successful?

Mr. Rynder: Yes, sir.

Mr. Examiner, may I say another word off the record.

(Discussion off the record.)

Mr. Smith: I desire to be given leave to put in the record within a reasonable time after the close of the hearing certain documents. The first which I wish to refer to is Exhibit 51-E in Bureau of Animal Industry, Docket 472. 51-E is a Government exhibit. It is an agreement dated Jersey [fol. 781] City, N. J., January 15, 1892, between the Chi-

cago Junction Railway and Union Stock Yards Company and Philip D. Armour and others and Nelson Morris and others and Gustavus F. Swift and others.

The second document to which I wish to refer is Government Exhibit 51-F in the same proceeding, which is an agreement dated Jersey City, N. J., June 3, 1892, between the Chicago Junction Railways and Union Stock Yards Company and Henry Blatchburg and others and the Chicago Packing and Provision Company and others.

If the Examiner cares, as I presume he will, to have a word about what those documents are, I may say this: At or about the date of these documents in the early 90's the packers at Chicago, including Swift & Company, had strongly evinced a purpose to participate in some manner in some degree in the profits which the Union Stock Yards & Transit Company derived from the conduct of that stock yards, including the services which it performed in handling direct shipments. The documents which I have referred to, and which cover, respectively, contracts between the Yards and the big packers, on the one hand, and on the other hand a contract between the Stock Yards and small packers, or some of the small packers, show very briefly these facts:

That the packers, in order to force the Yards Company to permit the packers to participate in the profits of the [fol. 782] enterprise of running the Stock Yards, had purchased some thousand acres of land in Indiana, near Chicago, and had also obtained property upon which they had built certain unloading facilities adjacent to their plants. They then began a suit in the Circuit Court of Cook County, Illinois, to require the Union Stock Yards & Transit Company to deliver the stock consigned directly to them at these facilities which they had constructed, without the imposition of the yardage charge which it appears the Union Stock Yards was then assessing on direct shipments of live stock consigned to packers. With those things as a background, the purchase of the Indiana land, the construction of these unloading facilities, and the suit that had been begun in the courts of Illinois, the packers undertook negotiations, apparently, with the Union Stock Yards & Transit Company, with a view to getting some of the profits of the Union Stock Yards from the conduct of the Stock Yards. A contract between the parties was drawn in London, and that proved abortive for various reasons. Finally these contracts which I desire to offer here were executed.

Under these contracts, which I think ran for only 15 years, or until 1906, it was agreed upon by the parties that the Indiana property which had been purchased by the Yards would be deeded and was deeded to the Union Stock Yards & Transit Company. The land on which the unloading facilities had been constructed at the plants of the pack- [fol. 783] ers, which were referred to in the contract as the Central Stock Yards, were deeded over to the Stock Yards. The packers agreed that for the period of the contract they would bring their live stock to Chicago and handle it through the Union Stock Yards facilities and would pay the yardage charges at the yards usually assessed on direct shipments of live stock, and there was also a guarantee on the part of the packers that the Yards' takings from those services would amount to a certain sum within a certain period. In return for all that the Yards Company turned over to the big packers certain very large amounts of bonds of the Jersey Company.

Now we propose to offer also, with the permission of the Commission, the following documents relating to those suits that were filed in the State Court of Chicago——

Mr. Rynder: Now, before you get to this, let me say this: Mr. Smith takes me by surprise and puts me in a position where I have absolutely got to ask for a further hearing. I think this should properly have gone in at Chicago, where these documents were available to us. In the first place, I have not read them. I come down here upon the assurance that the only thing to be put in here was the testimony of Mr. Cleveland about the increment in these rates. There is a great deal of testimony that needs to be put in if these are accepted in evidence. I would object to them going in at all, but if that objection is overruled I must, just as a [fol. 784] matter of fair play, have another hearing. I come down here thinking all I would have to do would be to cross-examine Mr. Cleveland, if indeed I need to cross-examine him, and it was stated to me in Chicago that the only thing to be puf in here was Mr. Cleveland's evidence as to the increment of the rates. But here we are confronted with old contracts, with various imputations to be put on them which only witnesses of my company can give, as to what the facts were, as to what was carried out, when they expired, and various things of that kind; and I think in a spirit of fair play, which I know this Commission will en-

force in this proceeding, that I must ask for an adjourned hearing in Chicago.

Examiner Carter: Off the record.

(Discussion off the record followed.)

Mr. Smith: May I complete my offer, and then we can discuss at a little more appropriate time the matter of a further hearing. I am going to make this further offer——

Examiner Carter: Go ahead and make your offer, and then we will take up, and I will rule on, the request for a further hearing.

Mr. Smith: I desire to offer within a reasonably short time after the close of the hearing a true copy of the complaint of Swift & Company in Docket 4418 filed in the Circuit Court of Cook County, dated 1891, in a proceeding entitled Swift & Company vs. Union Stock Yards & Transit Company.

[fol. 785] Now I ask Mr. Rynder, as a preliminary to asking the Commission to require him to produce the document, if he will furnish for the record within ten days after the close of the hearing a copy of the answer of the Union Stock Yards & Transit Company in that proceeding. The fact of the matter is there were three cases that were begun and were then consolidated for handling. One is the one I have named. The other is Nelson Morris & Company vs. Union Stock Yards & Transit Company, Docket 4420, dated in 1891 and filed in the Circuit Court of Cook County. The third is the case of Philip D. Armour vs. Union Stock Yards & Transit Company, Docket No. 4419, filed in the Circuit Court of Cook County in 1891.

Thus far we have been able to find the answer in but one of these three cases, namely, the Morris case. That answer appears to be a form answer; that is to say, it is printed with certain blank spaces which seem to have been left blank in order that the answer could be adapted to the other two cases, the Swift case and the Armour case, although that is simply conjecture on our part, But it is because we have only found the answer in the Morris case that I ask Mr. Rynder to supply for me from the records of his company a copy of the reply of the Union Stock Yards & Transit Company in the so-called Swift case.

I also ask permission to offer the complaints in the [fol. 786] other two cases, namely, the Morris case and the

Armour case, together with the answer filed by the Union Stock Yards & Transit Company in the Morris case.

I also ask permission to put in the record certain affidavits which were filed in the proceeding, the affidavits to which I refer being affidavits of officials of the Burlington, Milwaukee, and Chicago & Northwestern Railway companies.

I also ask permission to offer the stipulations which the parties to these proceedings filed with respect to the dismissal of these cases.

That completes my offer with respect to these cases. Now, Mr. Rynder, will you furnish that answer?

Mr. Rynder: I object to furnishing it, upon the ground that it is irrelevant and immaterial. I should like to have a ruling of the Examiner on that, and then I will state something further.

Mr. Smith: I can elaborate a little bit as to why I think it is material, but, if the Examiner please, I am also going to offer some rather extensive portions of the report of the Federal Trade Commission on the meat packing industry, and they carry on this interesting story which was begun with these contracts to which I have referred.

Examiner Carter: Suppose you complete your offer. I would like to know all that you are going to offer before I make any special ruling.

[fol. 787] Mr. Smith: I also desire to offer, within such time as the Examiner shall fix after the close of the hearing, certain excerpts from a document entitled "Food Investigation Report of the Federal Trade Commission on the Meat Packing Industry, Part 3, Methods of the Five Packers in Controlling the Meat Packing Industry", dated June 28, 1919, Washington, Government Printing Office, 1919.

I desire to offer the following parts of this document. In that connection I may say I have no objection to the whole document being submitted, but I offer parts of it simply for convenience and to save the expense. The part I offer now is Chapter 5, entitled "The Chicago Stock Yards", which extends from page 189 to page 277, inclusive, together with copies of those exhibits which follow the last page to which I have referred, which exhibits are specifically referred to in the text of the pages to which I referred, namely, 189 to 277, inclusive.

Now I have some other offers to make, but they bear on a

different point; and so, to conclude what I wish to say here with reference to the relevancy of these documents, I will say this:

This is an investigation made by the Federal Trade Commission in 1919 and in some years prior thereto, which covers the history of the Union Stock Yards at Chicago, the forms of the companies which controlled it, and the relationship [fol. 788] thereto of the five packers, including Swift & Company. In a moment I shall refer to that portion of the document which defines the five big packers. I may say that Swift is one of them.

Mr. Rynder: May I see that portion of it which relates to the relation of Swift & Company to the Stock Yards?

Mr. Smith: Well, I think there is something on almost every page of the many pages to which I have referred which does that.

Mr. Rynder: I think you may as well go ahead and give us a ruling as to whether this is in or out, Mr. Examiner. There are so many things on which I will make objection, and which I can only state to you after the offer has been made.

Examiner Carter: I want to let Mr. Smith finish; and I assume—if I am wrong in this, correct me—that the document to which you refer, Mr. Smith, the Federal Trade Commission report and the exhibits therein contained, you desire to have incorporated in the record for substantially the same purpose as the exhibits to which you have referred in Docket 472, the case now before the Secretary of Agriculture.

Mr. Smith: Yes, that is right. And I may say just this word further to enlighten Mr. Rynder about the scope of this, for the purpose of any objection he wants to make, that this investigation shows—this is my summary of it, and I will stand on it—that the Union Stock Yards, its parent com- [fol. 789] panies and the big packers, treated this stock yards service, including the service, the yardage on direct animals, as they would a commodity; and as I read this report my interpretation of it is that they bought it and sold it just as they would so many cattle on the hoof, and I say that the effect of that is to forever foreclose them from contending that the stock yards service which was so freely bought and sold is a transportation service under the Interstate Commerce Act.

A little more specifically, this report shows that after

these contracts to which I have referred, Exhibits 51-E and 51-F, were made, and after they had expired, that the parties apparently proceeded to in some manner perpetuate what was done in these contracts, and about the time of the decision in the Phaelzer case, in anticipation that the decision was going to be adverse, steps were taken to continue the arrangement between the Yards and the Packers, despite whatever the Supreme Court might do in that proceeding. This report says that the main company, which made a contract with the so-called Jersey Company as a result of which the main company got possession of all the very valuable cash reserves of the Jersey Company and the Union Stock Yards & Transit Company, that that company was organized as a service to the stockholders of the Jersey Company for the purpose of remunerating the packers so that they would have to give the Yards Company their patronage at Chicago. It was represented to the stockholders of the Jersey Company, as this report shows, that the pack- [fol. 790] ers generally were interested in that. The Commission finds that Swift & Company actually obtained no stock in the main company, that stock being all taken, apparently, by Mr. Prince and his family and by Philip D. Armour. But the Commission does find that it was unable to trace a very large amount of bonds that were exchanged in the transaction, and it leaves room for the surmise that some or all of the other big packers participated in the distribution of those bonds. So that however long this arrangement may have been continued, if indeed it has been terminated now, this report shows that throughout a long period of years, partly by this contract and partly by what the report shows as to the situation thereafter, there was an arrangement between some or all of the big packers and the Yards Company as a result of which the packers received in some form or other compensation in return for continuing to use the Stock Yards service of the Union Stock Yards & Transit Company at Chicago.

Examiner Carter: You have one other thing?

Mr. Smith: Yes, I have. I desire also to offer Part 3, which is a separate pamphlet, pages 21 to 85, inclusive, this portion of the report being carried under the caption "Control of Principal Yards by Big Five", the first half being Section 6, "Companies Controlled by Big Five", I want to offer everything between pages 21 and 85, inclusive. There is a large map which is made a part of that text, and which I

[fol. 791] think is not necessary to an explanation of the text, and while I will have no objection to the map being put in, of course I do not offer it, because of the difficulty of reproducing it. I offer this part of the report, subject to the reservation I have already made with reference to the relevancy of the situation at Yards other than Chicago as relevant to and as rebuttal to the showing that Mr. Rynder has offered with reference to the situation at certain other markets. I think that this report will tend to show that to some substantial extent the Big Five packers, including Swift & Company, have some voice, if not a dominant voice, in the determination of the practices of the Yards Companies at other points.

In addition I desire also to offer——

Mr. Rynder: What was that last document—a Federal Trade Commission document?

Mr. Smith: Yes.

Mr. Rynder: Both of them?

Mr. Smith: Yes.

Mr. Rynder: Two different reports?

Mr. Smith: No, they are just one report that is in five volumes, of five companies.

I desire also to offer a few pages from a document entitled "Food Investigation, Federal Trade Commission, on the Meat Packing Industry, Summary in Part 1, June 24, [fol. 792] 1919." The part which I desire to offer is the part shown on pages 23 to 27, inclusive, being entitled "Summary of Report on Meat Packing Industry, Letter to the President, bearing date 3 July, 1918, to the President of the United States", the particular part thereof to which I will call attention being as follows: "The operations of the five great packing concerns of the country, Swift, Armour, Morris, Cudahy and Wilson, have had such a dominant place that they control at will the market in which they buy their supplies and the market in which they sell their products, and hold the fortunes of their competitors in their hands."

I offer that portion of the report only for the purpose of identifying and describing the term "The Five Big Packers", or some similar term which is used at various places throughout other portions of the report, which I offer.

I think that completes my offer.

Examiner Carter: You may state your objections, Mr. Rynder.

Mr. Rynder: My objection would have to be stated of

course upon the theory that everything offered here is true. So I am merely stating the objection to the receipt of these documents at this time, and I am not waiving now what I have to say about the necessity for a further hearing. I would say that at the most they have to do with some relation, whether truly or falsely stated, that certain packers may have had in years gone by with certain stockyards. [fol. 793] Whether that relation was proper or improper, unjust or unreasonable, against good morals, has nothing to do with the right of these same packers in a suit against the railroads to obtain egress for their live stock to a public street. That is a right that we have by law or we have not, as this Commission may determine. Whether Swift & Company now own 50 per cent or 100 per cent of the Union Stock Yards, it would not change the issue in this case.

Mr. Smith: I can say in twenty words in response to that all I want to say at this time. These documents relate to many issues in this case and cast much light upon the issues. I will only refer to three respects and perhaps the least important respects in which the documents bear on this proceeding. There is a great deal of effort made by the complainants in this case to show that this matter of direct shipments to the packers was a relatively recent development. This evidence which I am offering shows that way back as far as 1891 there were direct shipments going into the packers at Chicago which were deemed by them to be of sufficient importance to be covered by these most interesting contracts. Then there is the point that it is now asserted that what is asked here is the continuation of a transportation service. The statute of the United States read in conjunction with these documents to which I have referred will show that throughout a very long period when these rela- [fol. 794] tionships existed that it was a crime to buy and sell any transportation service, and it bears very intimately on the question whether these people can now take the position that it is a transportation service when they are forced to recognize and take the position now that for long years they did not so regard it.

Further this evidence will show beyond peradventure of doubt that everybody recognized that there was nothing in the line haul rate to compensate the railroad companies for any service on direct shipments but that, on the contrary, throughout that long period of years that greatly desired patronage which the yards bought from these packers was

recognized to be a service for which they were paid and from which they retained revenue.

Now, that does not purport to be a complete statement of the position that we shall take as to the full bearing of these documents upon this case.

(Discussion off the record followed.)

Mr. Rynder: This matter brought in at this time is irrelevant to the issues in this case. I think that offering it is a surprise at this time and is enough to justify its exclusion at this time. It can have nothing to do with the question in issue in this case. The rights of Swift & Company as a shipper cannot be determined by any fact relating to any relationship it ever had to the Union Stock Yards and Tran-
[fol. 795] sit Company.

After this statement as to the objection and the ruling of the Examiner thereon, I will desire to make a further statement as to the necessity for further hearing if this evidence is admitted.

Examiner Carter: Gentlemen, I have not read the evidence which comprises Mr. Smith's offer, but it is my opinion that at least part of that evidence, assuming that evidence to have been correctly stated, is relevant to this proceeding, and therefore it will be my ruling to allow the testimony to be introduced.

Mr. Rynder: I would like to say something as to why it will be necessary to have a further hearing.

Examiner Carter: Go ahead.

Mr. Smith: Before we come to that, I would like to put something more positive on the record in connection with this. Let the record show that the contract to which I have referred as Exhibit 51-E of Docket 472 was not a contract to which Swift & Company was a party, but a contract to which Gustavus F. Swift and others were parties, their interest in the matter being stated in the contracts.

Secondly, I desire to say that in its report the Federal Trade Commission, as I recall its language, referred largely to Swift & Company rather than to any of those owning the stock of that company.

[fol. 796] (Discussion off the record.)

Mr. Smith: In view of the question as to what verb I used in referring to what was shown by the document that is dated June 28, 1919, may I say that I do know about the

consent decree having been entered and at one time had some knowledge of just what it purported to do. What I say now with reference to this offer and the relevancy of it is that it showed what the situation was in the opinion of the Federal Trade Commission at the time the opinion was rendered.

I may say further that I do not know at this moment what the effect of the consent decree was on that particular situation. I do know that we examined Poor's or Moody's a short time ago and, as we interpreted what was shown there, it showed some rather recent interest of Swift & Company in Stock Yards, but I may have misunderstood that showing. The relevancy to my mind of this excerpt which I am offering is subject to the reservation that none of these references which Mr. Rynder has made that the testimony which was offered to other yards is relevant, but if that is relevant then this is relevant as indicating that the Big Five Packers at and prior to the time of this report had some voice in the practices pursued by these other yards referred to in the report.

That refers to my offer of pages 21 to 85, inclusive, of Part 3 of the report of the Federal Trade Commission to [fol. 797] which I have referred.

(Discussion off the record.)

Mr. Smith: Mr. Examiner, in view of certain statements that Mr. Rynder has made here with reference to the operations of the so-called consent decree and the manner in which stock in certain Stock Yards held by the packers, which could not be immediately liquidated, was voted, I desire at this time, without prejudice to its resubmission if I should be so advised, to withdraw my offer of that portion of Part 3 of the report of the Federal Trade Commission appearing on pages 21 to 85, inclusive, and my comments made with respect thereto when the offer was made and since.

Examiner Carter: That permission will be granted and that will be not considered as a part of the record.

Now we can go on and allow—you have nothing further?

Mr. Smith: No.

Examiner Carter: Mr. Rynder, you may state on the record anything you may desire to state.

Mr. Rynder: I think there was first a request of me to file answers in certain suits. I made a few notes here, but

I may have missed something. Those suits were in what year?

Mr. Smith: I asked you to file a copy of the answer of the Union Stock Yards & Transit Company in the case of Swift & Company vs. Union Stock Yards & Transit Company, No. [fol. 798] 4408, filed in the Circuit Court of Cook County, Illinois, in 1891.

Mr. Rynder: In 1891. If the petition goes in I have no objection to the answer going in; but as I understand our office practice, in a case that is absolutely dead, and that applies to my own files, after a number of years we destroy the files just because of the lack of filing facilities. So that I very much doubt if we have in our law department or in those files or anywhere in our office any of the papers in that case at this time. I doubt whether I will be able to furnish it.

Mr. Smith: Will you furnish it if you can find it?

Mr. Rynder: Yes. If the complaint is in I certainly have no objection to having the answer in. Did you take the trouble to see whether that went on to any judgment?

Mr. Smith: I think I stated on this record it was dismissed by stipulation of the parties and that I proposed to offer a true copy of the stipulation.

Mr. Rynder: I don't know at this moment what is in that stipulation, to tell the truth. This is the first time I ever heard of the case. I just assume under our office practice there is not any part of it there at the present time.

Mr. Smith: I am not asking you to furnish the stipulation.

[fol. 799] Mr. Rynder: Now as to the reports of the Federal Trade Commission in 1919: I shall offer to prove and I will prove at the hearing that the conditions under which that investigation was made were these: That it was run, so to speak, by one Francis J. Heeney, who had some fame in California. That Mr. Heeney denied packers, who certainly had some interest, the right to put on a single witness during that investigation or to cross-examine a witness who was put on by the Government, and that in fact his investigation consisted for the most part of calling in newspaper men and reading them something of his own and throwing it over and telling the Examiner to put that in the record. Because of that fact, the parts that Mr. Smith has offered contain many misstatements of fact, many false statements,

which could have been shown to be so at the time of that investigation had Swift & Company and the other packers to whom that investigation related been allowed to put on witnesses of their own or to cross-examine Government witnesses, or to offer evidence in rebuttal. One of Mr. Heeney's favorite tricks was to take one letter and read it to the newspaper men and tell the Examiner to put it in the record. The Examiner, by the way, apparently had no rights or duties. Mr. Heeney would slam something out, "put that in the record", and then the newspaper men would trot out. For that reason it contains many misstatements of fact [fol. 800] which have always been known to be misstatements of fact by the companies who are interested there, and I think it has been largely discounted because of the manner in which the inquiry was conducted. If this is in it is evidence of what it purports to show, and it will put me to the necessity of calling a number of witnesses from different lines of our business and asking them line for line whether these statements in that report are true, and if not in what respect they are untrue.

Now I could not, out of decent respect for my client, let that evidence in and then not attempt to show what the facts were then and now. I feel also it is my duty to my client to show what the exact facts have been as to the interest of my client in the Union Stock Yards. I say now as counsel I will be able to prove to you it has been zero, and that is another thing I will have to prove.

Now, in view of the ruling of the Examiner admitting the evidence offered by Mr. Smith, I earnestly request, for the reasons I have just stated, that I be accorded a further hearing in this case. An additional reason for that is one that I believe was stated before: I am taken by surprise by this testimony, because when Mr. Smith talked to me in Chicago he said all he intended to offer here was the testimony of Mr. Cleveland as to the increment in these rates; and understanding that the hearing would cover only that subject-matter, I came here totally unprepared, without the wit- [fol. 801] nesses that are necessary to rebut the testimony and evidence that has just been offered.

I further must request that the hearing be in Chicago, because it would put my company to undue expense to call all the different witnesses who will have to be called to deal with the statements made in these reports of the Federal Trade Commission. They are not things that can be

rebutted by one man at one fell swoop. They relate to almost every activity of the company.

So for the reasons I have stated, I request a further hearing in the city of Chicago at a convenient time.

Mr. Smith: Two comments I would like to make.

Examiner Carter: Just one comment I would like to make. Mr. Rynder, you understand that I have not admitted any evidence yet. I have said that I think this evidence which is embraced in these offers is material to the issue. Of course I cannot rule on the admission of that evidence until it is actually offered; you understand that. You see what I mean? I have ruled that it is material.

Mr. Rynder: I have understodd your Honor's ruling to be that when it comes back to you, as Mr. Smith says he will send it, that it will then be admitted.

Examiner Carter: That is true. Now, whether Mr. Smith intends to send that to me or offer it at the further hearing, I do not know.

[fol. 802] Mr. Smith: I intended when I got back simply to send it to the Secretary. Can we have this understanding, then: That under the circumstances here it will be admitted and made a part of the record, subject to a motion by complainants to strike it if it develops upon an examination of the documents that they are not competent or material?

Examiner Carter: Yes.

Mr. Smith: I should think that would take care of that situation.

Examiner Carter: Then you propose, when you have it ready, to send it in?

Mr. Smith: Yes.

Now the comments which I wanted to make on Mr. Rynder's statement are these: First, Mr. Rynder, having been advised that there would be a further hearing, by request, and counsel for defendants having said he would have no objection thereto, his purported statements of fact with reference to the manner in which this hearing had been conducted by the Federal Trade Commission were immaterial to his request, and I move that they not be accepted as statements of fact.

Mr. Rynder: I do not consider any statement that counsel makes as evidence. I was stating there what I intended to prove.

Examiner Carter: It will be so understood, that what Mr. Rynder stated with respect to that was what he intended

[fol. 803] to prove and will not be accepted as any statement of fact.

Mr. Rynder: That is right.

Mr. Smith: I further want to say this with respect to the element of surprise that Mr. Rynder claims. As I stated, I make no objection to his request for a further hearing. I wish to say that at the last hearing Mr. Rynder requested the presentation of certain contracts which he believed were in existence, and it was an investigation of that request by me that led to the finding of these other documents and this other material that has been offered here today.

Mr. Rynder: I nevertheless would like to add on that, Mr. Examiner, that until the time these documents were offered here I was never in any way advised that such documentary proof would be offered at this hearing, and I think Mr. Smith will have to agree that that is a fact.

Mr. Smith: Of course I agree that that is a fact—wait a minute. I agree I did not give you any advice that any other documents——

Mr. Rynder: Let me say I was never apprised by Mr. Smith, and I will say I was never apprised or notified by anybody else.

Examiner Carter: Off the record.

(Discussion off the record followed.)

Mr. Smith: Since there must be another hearing, may I have permission to offer these documents as promptly as I [fol. 804] can get them together, but prior to the adjourned hearing? Mr. Rynder is fully advised now as to what they are, so he won't be prejudiced by that.

Examiner Carter: Yes, you may. In other words, you don't want to be confined to five or ten days, as the physical operation may take longer?

Mr. Smith: That is right.

Examiner Carter: This hearing is adjourned for further hearing at the Morrison Hotel, Chicago, Ill., on July 18, 1938, at 10 o'clock a. m.

(Thereupon, at 3.45 o'clock p. m., the hearing in the above-entitled matter was adjourned to July 18, 1938, at 10 a. m., at the Morrison Hotel, Chicago, Illinois.)

[fol. 805] Docket No. 27862

SWIFT & COMPANY, et al.,

v.

THE ALTON RAILROAD COMPANY, et al.

Chicago, Illinois, July 18, 1938.
9 O'Clock A. M., Central Standard Time.

Before Paul O. Carter, Examiner, Interstate Commerce Commission

Met pursuant to notice.

Appearances: As heretofore noted.

[fols. 806-807] Proceedings

Exam. Carter: Come to order please, gentlemen. The Interstate Commerce Commission has set for further hearing at this time and place Docket No. 27862, Swift & Company, et al., versus the Alton Railroad Company, et al. Are there any additional appearances to be entered?

(No response.)

Exam. Carter: Let the record show there is no response. This case, gentlemen, was adjourned at the hearing in Washington for further hearing at this time and place. Before we proceed with the further hearing, I would like to refer to certain papers which have been received since the last hearing. I have a letter here dated June 9th from Mr. Tyler, in which he sends a copy of I. C. C. tariff No. 12 and supplements Nos. 1 to 12 both inclusive. He was requested to file that for the record. That will be received in evidence as exhibit No. 44.

Mr. Rynder: Just a moment there, Mr. Examiner. I may have missed that somewhere, but I do not recall receiving that. Is that the recent tariff, Mr. Tyler?

Mr. Tyler: That is the I. C. C. tariff.

Mr. Rynder: Oh. That is the I. C. C. tariff on unloading?

Mr. Tyler: Yes.

Mr. Rynder: I see.

Exam. Carter: Do you desire copies of that, Mr. Rynder, or have you a copy of it?

[fol. 808] Mr. Rynder: We have put that in, in our direct evidence. It is already in, under another exhibit number.

Exam. Carter: Are you sure?

Mr. Rynder: Yes.

Mr. Smith: I do not have that in mind, if it is.

Mr. Rynder: It has already gone in under another exhibit number.

Mr. Smith: I guess it is exhibit 36.

Mr. Rynder: Yes.

Mr. Smith: Can you verify that, Mr. Reporter?

Exam. Carter: Yes. That is it.

Mr. Smith: I think, Mr. Examiner, although that was offered and received as an exhibit, sufficient copies were not supplied and the understanding was simply that they would be supplied.

Exam. Carter: That is correct. That is my understanding. We will just let the record show that the additional copies have been received. Do you desire a copy, Mr. Rynder?

Mr. Rynder: No, sir. I have a copy.

Exam. Carter: You have a copy?

Mr. Rynder: Out at the office, yes, sir.

Exam. Carter: I also have a letter dated June 22nd from Mr. Tyler in which he sent a legend to be attached to exhibit No. 1. Have you gentlemen received copies of that legend?

Mr. Rynder: I have.

Mr. Smith: Yes.

[fol. 809] Exam. Carter: That legend will be received in evidence as part of exhibit No. 1. It is understood it will be attached to exhibit No. 1. We will give it the exhibit number 1-A. It will be received in evidence.

(Complainants' Exhibit No. 1-A received in evidence.)

Exam. Carter: I have a letter here dated July 17th, from Mr. Rynder, representing complainants, in which he sent a copy of page 65 of a document entitled "Livestock, Meats, and Wool Market Statistics and Related Data 1936", published by the Department of Agriculture and dated Washington, D. C., April, 1937, the caption on page 65 being: "Hogs: Direct Receipts by Packers, Number and Percentage of Total Receipts, 1920-1936, Chicago." That will be received in evidence as exhibit No. 44.

(Complainants' Exhibit No. 44, received in evidence.)

Exam. Carter: I also have a letter dated June 24th from Mr. Rynder, in which he refers to certain documents which

were sent to him by Winston, Strawn & Shaw. One document was the Market News Service and the other document was "Receipts Direct to Packers". Mr. Rynder stated in that letter he did not call for that information and he assumes Mr. Smith will furnish it if he desires it to be placed in evidence. I also have a letter from Mr. Douglas Smith in which he encloses certain documents which he has designated and marked A to K, the first one of which will be marked exhibit No. 45. This document contains excerpts from "Agricultural Statistics 1937", issued by the United [fol. 810] States Department of Agriculture, showing the amount of directs received at the principal stock yards.

Mr. Rynder: Mr. Examiner, please bear with me a moment while I find that.

Exam. Carter: That is marked A.

Mr. Rynder: That will be exhibit No. 45?

Exam. Carter: Exhibit No. 45.

Mr. Rynder: Thank you.

Exam. Carter: That will be received in evidence.

(Defendants' Exhibit No. 45, received in evidence.)

Exam. Carter: I might say, permission to furnish that information was given on pages 739 and 740 of the record. Exhibit No. 46 will be a statement prepared by O. T. Henkle, showing the number of direct shipments of livestock consigned to the packers since 1934,——

Mr. Rynder: Was that statistical—pardon me, Mr. Examiner.

Exam. Carter: —accompanied by a letter from Mr. Henkle explaining why he did not supply the data for a longer period. Permission to furnish that information was given at pages 631 and 634 of the record.

Mr. Rynder: Just a moment, if the Examiner please. I put all of that matter into one folder, and I do not see that I have the document that accompanied the letter. However, I undoubtedly can get a copy from Mr. Henkle.

[fol. 811] Exam. Carter: That will be received in evidence as exhibit No. 46.

(Exhibit No. 46 received in evidence.)

Exam. Carter: The next document is government's exhibit No. 51-E in Bureau of Animal Industry Docket No. 472, which is an agreement dated Jersey City, New Jersey,

January 15, 1892, between The Chicago Junction Railways and Union Stock Yards Company, and Philip D. Armour and others and Nelson Morris and others, and Gustavus F. Swift and others, permission to file which was given on pages 780 to 783 of the record.

Mr. Smith: Mr. Examiner, as I understand it, that is Bureau of Animal Industry Exhibit No. 51?

Exam. Carter: 51-E.

Mr. Smith: 51-E is right.

Exam. Carter: That will be received in evidence as exhibit No. 47.

(Exhibit No. 47 received in evidence.)

Exam. Carter: The next document I have here is exhibit 51-F, Bureau of Animal Industry Docket No. 472, which is an agreement dated Jersey City, New Jersey, between The Chicago Junction Railways and Union Stock Yard Company and Henry Botsford and others, and The Chicago Packing and Provision Company and others, permission to furnish which was given at pages 781-783 of the record. That has been marked D. That will be received in evidence as exhibit No. 48.

[fol. 812] (Defendants' Exhibit No. 48 received in evidence.)

Exam. Carter: The next document in this series is a copy of the complaint of Swift & Company in Docket 4418 filed in the Circuit Court of Cook County, dated 1891 in a proceeding entitled Swift & Company versus The Union Stock Yards & Transit Company of Chicago, permission to file which was given at page 784 of the record.

Mr. Rynder: That is marked E?

Exam. Carter: Yes. That will be received in evidence as exhibit No. 49.

(Defendants' Exhibit No. 49 received in evidence.)

Exam. Carter: The next document in this series is a copy of the complaint in Nelson Morris & Company versus the Union Stock Yard & Transit Company in Docket 4420, dated 1891, filed in the Circuit Court of Cook County, permission to furnish which was given at pages 785 and 786 of the record. That is marked F. It will be received in evidence as exhibit No. 50.

(Defendants' Exhibit No. 50 received in evidence.)

Exam. Carter: The next document is a copy of the complaint in the case of Philip D. Armour versus the Union Stock Yard & Transit Company in Docket 4419 in the Circuit Court of Cook County, dated 1891, permission to offer which was given at pages 785 and 786 of the record. That is marked G. It will be received in evidence as exhibit No. 51.

Mr. Smith: If the Examiner please, I would like to get the [fol. 813] exhibit numbers on these last two straightened out. F has been received as Exhibit No. 50?

Exam. Carter: That is correct.

Mr. Smith: Then the next one will be exhibit 51?

Exam. Carter: That is correct. G is received in evidence as exhibit 51.

Mr. Smith: Thank you.

(Defendants' Exhibit No. 51 received in evidence.)

Exam. Carter: The next document in this series is a copy of the answer filed by the Union Stock Yard and Transit Company in the case of Nelson Morris & Company versus The Union Stock Yard and Transit Company in Docket 4420, filed in 1891 in the Circuit Court of Cook County, permission to offer which was given at pages 785 and 786 of the record. This has been marked H, and will be received in evidence as exhibit 52.

Mr. Rynder: That is 52?

Exam. Carter: Yes.

(Defendants' Exhibit No. 52 received in evidence.)

Exam. Carter: The next document in this series which is marked I is an affidavit of J. D. Besler, general superintendent of the Chicago, Burlington & Quincy Railroad Company, filed in the Swift case referred to in exhibit No. 49; and the affidavit also of A. J. Earling, general manager of the Chicago, Milwaukee, St. Paul & Pacific Railway Company, filed in the Armour case; also the affidavit of J. D. Springer, [fol. 814] third vice-president of Atchison, Topeka & Santa Fe Railroad Company, filed in the Morris case. Permission to file these was given at pages 786, 791 and 792 of the record. Exhibit No. 54 consists of copies of a stipulation filed by the parties in the Armour and Swift cases dismissing those proceedings.

Mr. Rynder: Just a moment, if the Examiner please.

Exam. Carter: Yes.

Mr. Rynder: I thought you said "Exhibit 54".

Exam. Carter: Yes.

Mr. Rynder: You said "exhibit 54".

Mr. Smith: I do not believe the record is quite clear, Mr. Examiner. Was it your Honor's intention to have these three exhibits given one number?

Exam. Carter: Which ones do you refer to?

Mr. Smith: Well, I had marked them in consecutive order, the Besler affidavit as exhibit 53, the Earling affidavit as exhibit 54, and the Springer affidavit as exhibit 55.

Exam. Carter: Perhaps that would be the better way to do it. Accordingly, we will receive the Besler affidavit in evidence as exhibit No. 53.

(Defendants' Exhibit No. 53 received in evidence.)

Exam. Carter: The Earling affidavit which is also marked I will be received in evidence as exhibit 54.

(Defendants' Exhibit No. 54 received in evidence.)

Exam. Carter: The Earling affidavit which is also [fol. 815] marked I, will be received in evidence as exhibit 55.

(Defendants' Exhibit No. 55 received in evidence.)

Exam. Carter: Now, the stipulations, or the copies of stipulations filed by the parties in the Armour, Swift and Morris cases are described in your exhibit K, are they not? Are those all of the stipulations?

Mr. Smith: K covers only the stipulation between Swift & Company and the yard company—just a moment. I am sorry, your Honor. They are all marked K.

Exam. Carter: That will be exhibit 56.

Mr. Smith: That is, the three stipulations together will constitute a single exhibit, No. 56?

Exam. Carter: Unless you gentlemen would rather have them marked separately.

Mr. Smith: I have no desire to have them marked separately, particularly.

Exam. Carter: Perhaps it will make the record more clear if we mark them separately. The stipulation dismissing the Swift case will be received in evidence as exhibit 56.

(Defendants' Exhibit No. 56 received in evidence.)

Exam. Carter: The copy of the stipulation dismissing the Armour case will be received in evidence as exhibit No. 57.

(Defendants' Exhibit No. 57 received in evidence.)

Exam. Carter: The copy of the stipulation dismissing the Morris case will be received in evidence as Exhibit 58. [fol. 816] (Defendants' Exhibit No. 58 received in evidence.)

Mr. Rynder: Mr. Examiner, I object to the introduction of, I believe—are there other exhibits to be offered?

Exam. Carter: Yes.

Mr. Rynder: I will wait until you are through.

Exam. Carter: Exhibit No. 59 is a copy of chapter 5 entitled "The Chicago Stock Yards", pages 189 to 277 inclusive, together with copies of the exhibits which, following the last page, are specifically referred to in the text of those pages, of a report of the Federal Trade Commission of the meat packing industry dated June 28, 1919. This chapter 5 appears in part 3, which is entitled, "Methods of the Five Packers in Controling the Packing Industry". That will be received in evidence as exhibit No. 59.

(Defendants' Exhibit No. 59 received in evidence.)

Exam. Carter: Exhibit No. 60 is a copy of a letter to the president, which is taken from the Food Investigation report of the Federal Trade Commission on the meat packing industry, part 1 and summary, dated June 24, 1919, pages 23 to 27 inclusive, entitled "Summary of Report on Meat Packing Industry." Permission to offer this evidence was given at pages 791 and 792 of the record. That is marked M, Mr. Rynder. That will be received in evidence as exhibit No. 60.

(Defendants' Exhibit No. 60 received in evidence.)

Exam. Carter: Exhibit No. 61 contains excerpts from the [fol. 817] testimony of O. T. Henkle, direct and cross examination in the hearing of Hygrade Food Products Corporation versus the Santa Fe Railroad, et al., Docket 24375.

Mr. Smith: Mr. Examiner, I think perhaps you are reading from my letter of transmittal, and if you are, I was incorrect in saying it is excerpts from Mr. Henkle's testimony. Rather, I should have said it is excerpts from the official stenographer's minutes in this case. In other words,

it is only part of that full record, but I believe it constitutes the entire direct and cross examination of the witness Henkle and was offered in that qualified manner I have indicated, at the time I received permission to submit.

Exam. Carter: That will be received in evidence as exhibit No. 61.

(Defendants' Exhibit No. 61 received in evidence.)

Exam. Carter: Now, gentlemen, those exhibits have been received in evidence subject to the objections which Mr. Rynder stated at the hearing in Washington on June 9th.

Mr. Rynder: Mr. Examiner, I want to reserve the right to make a motion to strike those exhibits—I am referring to exhibits 49 to 60 inclusive—after certain testimony has been offered here, and to argue it very briefly before you.

Exam. Carter: Very well. You may proceed, Mr. Rynder.

Mr. Rynder: Mr. Examiner, I have one or two exhibits I would like to offer at this time. Their relevancy if not ap- [fol. 818] parent now will be shown.

Exam. Carter: Proceed, Mr. Rynder.

Mr. Rynder: I am sorry to say, I have only one copy of this exhibit which I am about to present, which is certified by the clerk of the Supreme Court of the District of Columbia, in a decree entered on February 27, 1920. I had to tear the printed book apart to get a copy of it. I have handed it to counsel for defendants. I want particularly to call your attention in filing this exhibit to certain paragraphs thereof. In the first paragraph, after some recitative matter, I desire to call attention to the portion reading, as follows: "that while the defendants, and each of them, maintain the truth of their answers and assert their innocence of any violation of law in fact or intent, they nevertheless, desiring to avoid every appearance of placing themselves in a position of antagonism to the government, have consented and do consent to the making and entry of the decree now about to be entered without any findings of fact, upon condition that their consents to the entry of said decree shall not constitute or be considered an admission, and the rendition or entry of said decree, or the decree itself shall not constitute or be considered an adjudication that the defendants or any of them have in fact violated any law of the United States." In other words, there was no finding by the court of any violation of law. Without reading it, I would like to call your attention to the second para-

[fol. 819] graph, enjoining the defendants from owning, and so forth, any interest in any public stock yards company, and to paragraph 10, stating very broadly the terms under which those exhibits would have to—or rather, I mean, the terms under which the defendants would have to divest themselves from those interests.

Exam. Carter: That will be exhibit No. 62.

Mr. Rynder: I offer it in evidence, if the Examiner please.

Exam. Carter: It may be received.

(Complainants' Exhibit No. 62 received in evidence.)

Mr. Rynder: There was some intimation by counsel for defendants that the fact that we and certain other packers here had filed a petition for intervention in Docket No. 472, indicated something peculiar or underhanded, about the Union Stock Yards of Chicago. In order that the Examiner and the parties may be advised of just what our interest was in that case, I offer as my next exhibit a copy of the petition of intervention.

Exam. Carter: It may be received in evidence.

(Complainants' Exhibit No. 63 received in evidence.)

Mr. Smith: Could you definitely refer to the page of the record where those statements were made, to which you just called my attention?

Mr. Rynder: No, I cannot, but I recall them distinctly. Give me time enough, and I can find them.

Mr. Smith: Perhaps you can tell me later in the day.

[fol. 820] Mr. Rynder: All right. In filing this exhibit which is numbered 63, I would like to call attention to the fact that it was a petition of all the packing companies, so far as I am aware, large and small, who had business on the Chicago Stock Yards, and the interest in the case plainly appears from the petition itself. So far as that case is concerned, in connection with the filing of this petition for intervention, I received a letter signed by one Mastin G. White, solicitor of the Department of Agriculture. I do not know whether that was his letter or his signature. I have never met the gentlemen. I do not know his signature. However, it came back with this letter. Under the circumstances, unless there is objection, I would like to offer that, after you and counsel for the defendants have had a chance to look at it. That will be marked as what exhibit number?

Exam. Carter: 64.

Mr. Rynder: If there is any objection, on any technical grounds, I am perfectly willing to withdraw it.

Mr. Smith: Just a moment. May we go off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Back on the record.

Mr. Rynder: If there is any technical objection, I will withdraw it.

Exam. Carter: I think Mr. Smith said he had no objec-
[fol. 821] tion. Exhibit 64 will be received in evidence.

(Complainants' Exhibit No. 64 received in evidence.)

Mr. Rynder: Mr. Examiner, before proceeding with my evidence, I should like now to be advised if the defendants have any further direct evidence.

Mr. Smith: Why, we have three or four documents which we may desire to offer. I am not sure about all of them. We will see how the matter proceeds.

Mr. Rynder: I do not think that is a fair procedure. The way I was caught at Chicago, I may be caught again here with a request for a further hearing.

Exam. Carter: You mean, at Washington?

Mr. Rynder: At Washington, yes.

Mr. Smith: I have no objection to indicating. I will not accept the suggestion that it would be unfair for me not to do so, but I do not have any objection to indicating at the moment what I have here, without binding myself not to offer anything else, if the Examiner thinks it would be desirable.

Exam. Carter: It might tend to facilitate the hearing if you would just briefly explain that, Mr. Smith.

Mr. Smith: We propose to offer the new stock yard tariff which has superseded the one that was in effect at the time the principal hearing was held. I have some additional copies of the pictures that were offered. They will be submitted. We have an affidavit or two which were filed in this
[fol. 822] same proceeding in the state court here, which are descriptive of the central stock yards, which the packers had built. Then I propose to file a copy of the answer of the stock yards in the so-called Swift case filed in the state court as soon as it is furnished to me by counsel for Swift & Company, which I think he said he would do if he had it. Inasmuch as he does have it, I assume he will supply that.

There are one or two other matters I may seek to cover by affidavit, but that depends upon what further testimony is submitted by the complainants.

Mr. Rynder: Well, I do not see why that should not be offered. I have no objection at all to the new stock yards tariff, of course. I have no objection to some more pictures. However, an affidavit as to these ancient papers relates to the matter I am about to meet.

Mr. Smith: I will offer those affidavits at this time.

Exam. Carter: Very well.

Mr. Smith: We offer as exhibit 65 a certified copy of the affidavit of Sheldon E. Holmes, filed in Philip D. Armour, et al., versus the Union Stock Yard and Transit Company and other cases in the Circuit Court of Cook County, the other cases being those of which pleadings have already been offered herein. We offer as exhibit 66 a certified copy of the affidavit of George Alexander filed in the proceeding to which I have just referred. Both of those affidavits obviously contain matters relating to those suits.

[fol. 823] Exam. Carter: Very well. Are you ready to proceed, Mr. Rynder?

Mr. Rynder: Provided Mr. Smith has fully stated what he proposes to put in.

Mr. Smith: Mr. Examiner, have those exhibits been received in evidence?

Exam. Carter: Exhibits 65 and 66 are received in evidence.

(Defendants' Exhibits Nos. 65 and 66 received in evidence.)

Mr. Rynder: Has Mr. Smith fully stated what he proposes to offer?

Mr. Smith: I have said all I propose to say on the subject, Mr. Rynder. You can follow your own inclinations.

Exam. Carter: If Mr. Smith later on desires to offer something to which he has not heretofore referred, he will have to refer to that when it is offered.

Mr. Rynder: Let the record show that for reasons heretofore stated I object to exhibits 65 and 66, but I would like to postpone any argument about that until a motion to strike is made.

Exam. Carter: Your objections will be noted. The ruling will be as I have previously indicated. Your exceptions are allowed. Are your ready to proceed, Mr. Rynder?

Mr. Rynder: Yes.

Exam. Carter: You may call your witness.

Mr. Rynder: I will call Mr. Chaplin.

[fol. 824] Exam. Carter: Raise your right hand, please, and be sworn.

JOHN M. CHAPLIN was sworn and testified as follows:

Direct examination.

By Mr. Rynder:

Q. Please state your full name for the record, Mr. Chaplin.

A. John M. Chaplin.

Q. Your residence?

A. 11620 Longwood Drive, Chicago.

Q. Has practically all of your business employment been with Swift & Company?

A. Yes, sir; 50 years.

Q. Please state briefly the nature of your employment with Swift & Company?

A. I started at the Kansas City plant when it was in the process of being constructed. I was in the accounting department starting as a junior clerk and in the course of seven or eight years I was put in charge of the office as office manager and chief accountant. In 1899 I was transferred to Chicago as assistant to the general office manager. I was in charge of the accounts and operations of our plants, as affected their accounting.

Q. Did that cover all of the records, accounts, investments and so forth of Swift & Company and certain allied subsidiary companies?

A. Yes, sir.

[fol. 825] Q. And certain individual investments and accounts and so forth for the Swift family and Swift estate?

A. Yes.

Q. How long have you been comptroller of Swift & Company?

A. For the last 13 years.

Q. Did you retire from that position on the 1st of this year?

A. Yes, sir.

Q. During that term of office as comptroller, did you have

access to all of the books, papers and memoranda of Swift & Company and were you also informed as to all of its investments by way of stock holdings, either direct or through trustees on behalf of Swift & Company?

A. Yes, sir.

Q. Did your duties during that time also afford you an opportunity to become acquainted with such records, investments and so forth prior to the time you assumed the office of comptroller?

A. Yes, sir.

Q. Did you as a result of your position become acquainted with the agreement between the Chicago Junction Railways and Union Stock Yards Company and Philip D. Armour and others, which has been offered here in evidence as exhibit No. 47?

A. Yes, sir. I knew about it after it had been completed.

Q. Did you gradually become acquainted with the various instructions and transactions which had originally led to its execution?

[fol. 826] A. In a general way, yes.

Q. I call your attention to the fact that most of the provisions of the contract were made to expire 15 years from July 1, 1891. The income bonds mentioned in paragraph 10 were payable, as to principal, on or before the first day of July, 1907. Can you state from the records of the company whether those income bonds were paid in accordance with the terms of the contract?

A. Yes, they were paid.

Q. Thereafter was any payment made to Swift & Company by any similar contract or by any other means by the Union Stock Yard and Transit Company of Chicago or any of its holding companies?

Mr. Smith: That is objected to on the ground that no proper foundation has been laid.

Exam. Carter: Read the question.

(Question read.)

Exam. Carter: I would like to ask the witness one question.

By Exam. Carter:

Q. You have been in charge of all the records of your company, the financial records and accounting records?

A. Yes.

Q. For the last how many years?

A. 37 years. I did not have actual charge, as head of the accounting department. I was an assistant, but I had access and knowledge of those matters.

Mr. Smith: May I ask just one question there?

[fol. 827] Exam. Carter: Yes.

By Mr. Smith:

Q. Were you treasurer of the company?

A. No, sir.

Q. You did not receive moneys paid to the company?

A. No, sir.

Q. Your knowledge is limited to such entries as were made on the books of the company?

A. Yes, sir.

Mr. Smith: I object to the question as calling for a conclusion of the witness, no proper foundation having been laid. If a question were asked, whether or not record was made on the books, I think I should not be inclined to object to it, but this question goes beyond that.

Mr. Ryder: I want to go much beyond that, Mr. Examiner. If there were book entries of any kind, I could not produce any living witness who could go beyond the books, but if there were any book entries made under a federal statute, I could produce merely the book entries. I have here to prove a negative fact, which of course cannot be proved by entries, but merely by the absence of them. I believe the witness has been well qualified, having for the past 13 years, up to January 1st of this year, been comptroller of the company. He has testified he is acquainted with all of its investments and income, and for many years prior to that time, equally familiar with those same facts.

[fol. 828] Exam. Carter: Your objection goes to—do you want the books produced, Mr. Smith?

Mr. Smith: No. I do not want the books produced, Mr. Examiner. My objection is exactly this: this witness is a bookkeeper, and up until 13 years ago he was not in charge of the books, but his duties related to the handling of the books. I think in the last 13 years at least this witness is qualified to testify by the foundation that has been laid in the informal was these proceedings are conducted, as to

what entries have been made or have not been made on the books. As I have said, I think I would not be disposed to object to testimony by this witness that in the last 13 years no entry had been made on the books of the company showing any payment from the yards. I do object to the witness being permitted to answer if he should be disposed to do so, that Swift & Company has not received any moneys or any payments of any consideration of any type from the yards company. From what he has said to me, in answer to my questions, he has made it clear his knowledge is limited to what has been put on the books. I am not at all ready to concede that if payments had been made they necessarily would have been put on the books. I am objecting specifically to the attempt to elicit from this witness testimony that is broader than simply what has been put on the books of the company.

Mr. Rynder: Let me ask a question or two more of Mr. [fol. 829] Chaplin.

Exam. Carter: All right.

By Mr. Rynder:

Q. At my request and after the Washington hearing, did you make a special investigation into the subject of this payment from all of the books, memoranda, and the officers and other people from whom any information could be obtained?

A. You are referring to the bonds that——

Q. To the bonds under the Armour contract.

A. Yes. I refreshed my memory on it.

Q. As to those bonds?

A. Yes.

Q. Did you refresh your memory as to any other payments by the Union Stock Yard and Transit Company to Swift & Company?

A. Yes, sir.

Exam. Carter: Just a moment.

By Exam. Carter:

Q. What was the nature of your investigation, Mr. Chaplin?

A. Well, it was based largely on my own recollection. Of course, for many years prior to the time that I was made comptroller, I was in charge of the force of auditors,

of the accounting, balance sheets and loss and gain statements of Swift & Company, and in the position of assistant to the general office manager. The fact as to receipt of bonds or stock or other considerations from the Chicago Stock Yards was fixed in my mind particularly by the fact [fol. 830] we had investments in all of the other large stock yards companies, but we had no investments in the Chicago yards. That was a continuing knowledge that I had over many years.

By Mr. Smith:

Q. When you refer to investments, you mean stocks and bonds?

A. Stocks and bonds.

Mr. Smith: I see.

Mr. Rynder: Let me ask another question.

By Mr. Rynder:

Q. To the best of your knowledge, is any money ever received or paid out by Swift & Company without proper entries on its books?

A. No. Swift & Company would not have received the money or benefit from the money unless it was put into the treasury and if it was put into the treasury, it would have to be recorded on the books.

Mr. Smith: I move to strike that as a conclusion of the witness.

Mr. Rynder: I think it is a fact. He knows about how the company operates.

By Exam. Carter:

Q. How did you have that knowledge? You were the head of the accounting department?

A. Yes.

Q. Certain entries came to you and certain transactions came to your attention to be entered on the books?

[fol. 831] A. Yes.

Q. Is that correct?

A. Yes.

Q. Were your duties confined to the making of those entries?

A. No.

Q. What other duties did you have? How would you know?

A. I was in full charge of the accounts and records of our plants. The bookkeeping was done by bookkeepers. I had auditors who checked the books. I saw that if our treasury department received money and recorded it in the bank account and sent it to the bank account, it would have to appear in the accounts. Otherwise the books would be out of balance.

Mr. Smith: Well, that is, you mean if it had been deposited to the account of Swift & Company.

The Witness: Yes. If it had been stolen, of course, or diverted and not put on the books——

By Mr. Smith:

Q. You would not know about it?

A. No. I would not necessarily know about it.

Mr. Smith: We are talking here, Mr. Examiner, about an item which if received would not have been shown on the books, subsequent to the decision of the court in the Pfaelzer case, I assume. I do not think the bookkeeper of the company is qualified, therefore, to testify on that subject.

Mr. Rynder: You must understand, in referring rather slightingly to Mr. Chaplin as the bookkeeper of the company——

[fol. 832] Mr. Smith: I did not mean any slight by that at all.

By Mr. Smith:

Q. What is your title, Mr. Chaplin?

A. Comptroller.

Mr. Rynder: Comptroller.

Mr. Smith: I see.

Mr. Rynder: If I may ask him a few more questions along that line, I would like to have him elaborate. He went a great deal further than merely directing the accounting. Now, if I have to prove a negative fact here, in a way that Mr. Smith suggests, I might have to call in a horde of witnesses here—and incidentally, all but one of the persons named in the contract are dead—to say "I did not get it"

and "I did not get it", yet this man knows whether Swift & Company got it.

Exam. Carter: Is this true, Mr. Chaplin, that what you mean was this:

By Exam. Carter:

Q. If money was paid to the treasury of Swift & Company you would know about it, is that right?

A. Yes.

Q. If it was paid in any other form to any other person you would not necessarily know about it in your official capacity, is that correct?

A. Well, partially so. I had the job of auditing the books of the Swifts through my auditors.

Q. Of the individual stockholders in the concern?

A. Yes. I saw the audits, and while I would not neces- [fol. 833] sarily be intimately acquainted with the details of any item, such as is intimated here, I think it would be noticeable. I think I would remember it.

Q. Well, now, during this period, could you name whose books you audited in addition to the books of Swift & Company and members of the Swift firm or corporation?

A. There was Gustavus F. Swift; Edward F. Swift; Louis F. Swift, I think. Later on I audited the books of Charles Swift and Harold Swift.

Q. During what period did you audit the books of those individuals?

A. Once a year.

Q. From when, beginning at what date, about?

A. You mean, how far back in years?

Q. Yes.

A. I would say 30 or 35 years.

Q. Did you do that personally?

A. No, sir.

Q. In what capacity were you 35 years ago?

A. I was in charge of accounting and offices of our packing houses.

Q. Was that the accounting department of the entire company, or simply of the branch which had to do with packing houses?

A. It was that particular branch. I also had access to the complete accounts, or the complete accounting of the company.

[fol. 834] Q. Do you mean that your office which had to do with the packing plants was the organization which audited the books of these individual members of the Swift firm?

A. Yes, sir. I had traveling auditors who worked on the accounts of the packing plants and they were used between times to check up the books of the Swifts.

Exam. Carter: I have been trying to develop further his qualifications. We now have before us Mr. Smith's motion. Mr. Reporter, please go back and read Mr. Smith's motion.

(The record was read.)

Mr. Rynder: Mr. Examiner, if Mr. Smith would delve far enough into the mess of mud which he started, he would find that Mr. Heney himself at the congressional hearings stated that Swift & Company never received any part of that issue of the Maine Company.

Mr. Smith: I object to that statement of counsel as being unsupported by evidence in this record.

Mr. Rynder: For the present moment I want to call your attention to the fact that Mr. Smith is trying to support his motion on the theory that something crooked or of unlawful import was done. That requires direct testimony, to prove it. There is merely here in the record an intimation by Mr. Smith that something of that kind was done. There is no proof of the fact. Now he says I cannot disprove the fact even by a witness who was acquainted with all the [fol. 835] entries in the books over a long period of years.

Exam. Carter: I do not think Mr. Smith says that, Mr. Rynder.

Mr. Rynder: Yes, he did. Yes, he did.

Exam. Carter: I do not think so. I do not think his objection was to this witness testifying——

Mr. Rynder: To the entries in the books.

Mr. Smith: That is right.

Exam. Carter: That is what I had in mind.

Mr. Rynder: I want him to testify to his knowledge, and it is tremendous. He has been there for years.

Exam. Carter: I am perfectly willing to let him testify as to his knowledge, if it is real knowledge. That is what I have been trying to find out. Now, let us have that motion read again.

(The record was read.)

Exam. Carter: I will grant that motion at this time. You may develop it in a different way, but it seems to me that this witness has not qualified himself as to his personal knowledge of certain of these transactions. He has qualified himself as to the existence of any record on the books made in these transactions. You may proceed. I will have to rule as we go along.

Mr. Rynder: All I have to meet here is a negative, not anything that purports to be a proved fact. On page 10 of what the stenographer gave us in Washington, Mr. Smith [fol. 836] said: "The Commission finds that Swift & Company actually obtained no stock in the Maine Company, that stock being all taken apparently by Mr. Prince and his family and by Philip D. Armour. But, the Commission does find that it was unable to trace a very large amount of bonds that were exchange in the transaction and it leaves room for the surmise that some or all of the other big packers participated in the distribution of those bonds, so that however long this arrangement had been continued, if, indeed, it has been terminated now, this report shows that throughout a long period of years"——

Exam. Carter: Just a moment, please, Mr. Rynder.

By Exam. Carter:

Q. Mr. Chaplin, can you state of your own knowledge whether or not any member of the Swift firm has received any of these bonds referred to in this contract?

Mr. Smith: May I have that question read?

Exam. Carter: Read the question.

(Question read.)

Mr. Smith: Would you ask with reference to the interest as to the bonds, or interest therefrom?

Exam. Carter: Yes.

Mr. Rynder: To get it straight, I think the witness testified or was about to testify—I do not know why the interruption came when it did—he was about to testify that contract was carried out.

Mr. Smith: He did testify to that.

[fol. 837] The Witness: I did testify to that.

Mr. Rynder: And the bonds were issued and the bonds were paid off; and that thereafter no compensation of any

kind had been received by Swift & Company from the Union Stock Yards.

Exam. Carter: I do not think he has testified—let me ask this: did that contract provide that any member of the firm of Swift & Company was to receive bonds?

Mr. Rynder: It provided that Swift & Company—no. It provided——

Mr. Smith: It provides that either Swift & Company or Gustavus Swift will receive these bonds, and the witness has testified they did receive those bonds and those bonds were subsequently paid. I understood the Examiner to be inquiring whether the witness could testify as to whether or not any bonds or interest thereon or consideration were received by the Swifts in subsequent years. Was I right or wrong in that interpretation?

Exam. Carter: I meant during the entire period. Let me get this thing straight in my own mind.

By Exam. Carter:

Q. Swift & Company as a corporation received certain bonds as a result of this contract, is that correct?

A. Yes, sir.

Q. And those bonds were subsequently paid off?

A. Yes.

Q. Is that correct?

[fol. 838] A. Yes, sir.

Q. I might ask you this: has Swift & Company or anybody, any individual connected with Swift & Company—that is, any official stockholder connected with Swift & Company—received subsequent to that date any compensation of any kind from the Union Stock Yard & Transit Company, so far as your knowledge goes?

A. No, sir.

Q. Is your knowledge based solely on entries that might appear in the books, or the non-existence of such entries?

A. My knowledge is based on the books, of course, what the books record, which would of course mean that if bonds or stock had been received for the benefit of Swift & Company, then necessarily they would have to be on the books.

Q. That would not be true if bonds or interest or any other compensation had been received by individual stockholders of Swift & Company?

A. Not so far as Swift & Company's books are concerned.

Q. Can you state of your own knowledge whether or not

such compensation in any form has been received by stockholders, any stockholders of Swift & Company from the Union Stock Yard and Transit Company since the original bonds were paid off?

A. I can only testify as to what my recollection is of the audits that were made from time to time.

Mr. Rynder: Just let me interrupt you there to get that [fol. 839] clear. You are asking Mr. Chaplin a question which refers to stockholders. When you ask about any stockholders, that covers perhaps 46,000 or 50,000 people. I understand that schoolteachers and others have bought Swift's stock as a family investment, for 40 or 50 years, and the individual investments of those stockholders were never reported to Swift & Company. I think Mr. Chaplin can testify concerning the corporation, concerning the officers of the corporation during this period.

By Mr. Rynder:

Q. Is that right, Mr. Chaplin?
A. Yes, certain of the officers.
Q. Certain of the officers?
A. Yes.

Exam. Carter: Let me ask you this question:

By Exam. Carter:

Q. When this contract of 1892 was made, you say you subsequently found out about that contract?

A. When I came to Chicago and assumed my supervisory duties. That was in 1899—rather, it would be some years after 1899.

Q. Was that contract in the records of the company?
A. Yes, sir.

Exam. Carter: Go ahead, Mr. Rynder.

By Mr. Rynder:

Q. I will ask you whether, to your knowledge, Swift & Company as a corporation or any of its officers as far as you know ever received any compensation from the Union Stock Yard and Transit Company after the expiration of the contract which is exhibit 47.

[fol. 840] Mr. Smith: Let me say that I will withhold any objection to that question, because counsel says "as far as the witness knows".

The Witness: No.

By Mr. Rynder:

Q. Now, to what extent do you know? Let us go this much further: were you in your capacity as comptroller up to the first of this year acquainted with all the investments of Swift & Company?

A. Yes, sir.

Q. Were they shown on the books?

A. Yes, sir.

Q. Did you see them personally from time to time?

A. Yes, sir.

Q. Were any of those investments of Swift & Company, any ownership by it of stock, preferred or common, or bonds or any other class of security or securities of the Union Stock Yard and Transit Company of Chicago, or the Chicago Junction Railways and Union Stock Yard Company of New Jersey, or the Union Stock Yards Company of Maine?

A. No. We never had any investments in those stocks or bonds.

Q. Swift & Company?

A. Subsequent to 1907,—yes. Swift & Company.

Q. As to the officers you have mentioned, whose books you incidentally audited, would your answer be the same?

A. Yes.

[fol. 841] Mr. Smith: What was that question?

Mr. Rynder: Have the reporter read it.

Exam. Carter: Read the question please, Mr. Reporter.

(Question read.)

By Exam. Carter:

Q. Have you audited the books of these gentlemen continuously—or rather, since what time have you audited the books of these gentlemen continuously?

A. I suppose for 30 or 35 years.

Q. That is, the personal books of these incividuals?

A. Yes.

Mr. Smith: Mr. Examiner, he did not say he did the auditing. He just said—

The Witness: I did not do the auditing.

Mr. Smith: He has not audited any of them himself.

By Exam. Carter:

Q. You were basing your testimony on what your auditors reported to you?

A. Yes.

Q. Is that right?

A. Yes, sir.

Mr. Rynder: Let me ask you this question, Mr. Chaplin:

By Mr. Rynder:

Q. Was it necessary to keep the books so as to show the true facts as to Swift & Company's income, expenses and investments?

A. Yes, sir.

Q. Was that particularly necessary after the passage of [fol. 842] the first income tax law?

A. Yes, sir. Our books were audited by the treasury department.

Q. Did you or your immediate superiors follow through the audits made by the treasury department as to income?

A. Yes.

Q. Expenses?

A. Yes.

Q. And investments?

A. Yes.

Q. Was any such interest as I have described in the Union Stock Yards ever discovered in any of those audits?

A. No, sir.

Q. Did your immediate superiors have charge of making reports to the treasury department upon which Swift & Company's income taxes are based each year?

A. Yes, sir. One of my assistants had personal charge of it.

Q. Was any such income—or rather, any such investment in any of the three companies above mentioned ever reported to the United States government on your sworn income tax return?

A. No, sir.

Q. Now, besides that was there general knowledge that you and your officers of the corporation had as to where your investments were and where they were not, and where your income was and where it was not?

Mr. Smith: I did not hear that question. Read it, Mr. [fol. 843] Reporter.

(Question read.)

Mr. Smith: I object to the question so far as it relates to the other officers' knowledge.

By Mr. Rynder:

Q. Was there general knowledge on your part gained from your association with the directors and others?

A. Yes, sir.

Exam. Carter: As to where the investments and income of Swift & Company——

By Mr. Rynder:

Q. As to where the investments of Swift & Company and of the officers you have mentioned as having audited their accounts—as to where their investments were, and what income they had?

Mr. Smith: That is objected to, because no proper foundation has been laid. It is incompetent.

Mr. Rynder: I do not know. I think I have gained a good bit of knowledge out there myself in the years I have been out there, that one would gain just picking it up here and there.

Exam. Carter: He might have gotten some general knowledge; that was your question, was it not, Mr. Rynder?

Mr. Rynder: Yes.

Exam. Carter: Your question was confined to general knowledge, I assume.

Mr. Rynder: Yes.

Exam. Carter: You do not necessarily mean to embrace [fol. 844] in that question exact and complete knowledge, do you?

Mr. Rynder: I will ask this:

By Mr. Rynder:

Q. Were you informed generally at that time as to the Swift & Company holdings in stock yards generally?

A. Yes, sir.

Q. Are they listed with substantial accuracy at page 24, part 3, of the report of the Federal Trade Commission on the meat packing industry in 1919?

A. Yes, sir.

Q. You had examined that before the time of this hearing, had you not?

A. I had this statement prepared and furnished it to the Federal Trade Commission.

Q. At that time?

A. Yes, sir.

Mr. Smith: I would like to identify that in connection with exhibit No. 59. Is that part of exhibit 59?

Mr. Rynder: I do not know.

Mr. Smith: May I examine it, please?

Mr. Rynder: I am not quite through with it.

Mr. Smith: Well, I do not want the witness putting in a lot of testimony about sometning I have not seen and do not know anything about. Let me examine it, and then you can go ahead.

Mr. Rynder: Not just now, please.

[fol. 845] Mr. Smith: I object to any further questions about that document if I cannot look at it.

Exam. Carter: I will sustain the objection.

Mr. Rynder: Two people cannot look at it at the same time. I am about to pass this along. I had to have it here for a moment for the witness to refer to.

Exam. Carter: Before you ask questions now, Mr. Rynder, you should permit counsel to examine it.

Mr. Rynder: Very well.

Mr. Smith: Mr. Rynder, this is part of the report of the Federal Trade Commission I offered at the last hearing and subsequently withdrew, without prejudice, following some statements made by you concerning a consent decree, is it not?

Mr. Rynder: I think so.

Mr. Smith: I do not object to the witness answering questions about this, your Honor.

Mr. Rynder: As I said, Mr. Smith—are you through?

Mr. Smith: If it is to be offered in evidence, I do not object to the witness answering questions about it, but the table itself that the witness said he prepared in response to the request of the Federal Trade Commission is the best evidence of what it contains.

Mr. Rynder: I do not think I am in that position at this time.

Exam. Carter: Let me ask you this: this table you refer [fol. 846] to is not part of the evidence, is that correct?

Mr. Smith: It is not, at this time.

Exam. Carter: What was the last question, Mr. Reporter?

(Question read.)

Exam. Carter: Are you going to offer that in evidence, Mr. Rynder, or extracts from it, from that particular portion, or are counsel going to stipulate that it shall be considered as part of the record? Otherwise, it is not part of the record.

Mr. Rynder: I will ask Mr. Chaplin one or two questions if I may.

Exam. Carter: Go ahead.

By Mr. Rynder:

Q. Did you make a report to the Federal Trade Commission in connection with the investigation about which we have been talking, showing the holdings of stock ownership not only of Swift & Company, but of the Swift family?

A. Yes, sir.

Q. In that report to the Federal Trade Commission did you show any holdings by Swift & Company, or the Swift family in the Chicago Union Stock Yard and Transit Company or any of its two affiliates?

A. No, sir.

Q. Was that report true to the best of your knowledge and belief at the time you made it?

A. Yes, sir.

Q. That was in 1918?

[fol. 847] A. Yes, sir.

Mr. Smith: I move that all of that be stricken, relating to this report, as not the best evidence, unless the report about which the witness has been testifying is made part of the record.

Mr. Rynder: Counsel is very adroit. He offers at Washington something I expect to have to meet here, namely, that part of the Federal Trade Commission report which I assumed would be in evidence, which the Examiner admitted; and then apparently having found in it something that in itself negatives his own intimation, he fails to make it part

of the record here this morning. If the Examiner will give me leave to do so, I do not want to copy volumes here, but I would like in connection with his testimony to furnish the table shown on pages 24 and 25 of part 3 of the Federal Trade Commission report we have been talking about.

Mr. Smith: Mr. Examiner, that will not be complete unless what is shown on pages 23 at the point where it reads "Extent of Big Packer Interests", from there on down to page 26, down to the heading "Relative Importance of Big Packer Yards".

Mr. Rynder: I am only attempting to prove facts here about Chicago. At the present time, for my purpose it is perfectly complete, as to Chicago.

Exam. Carter: We will recess for five minutes. I will rule on it after recess. I would like to see, during the recess, [fol. 848] what the two items are.

(Short recess.)

Exam. Carter: Proceed.

Mr. Rynder: Mr. Examiner, I desire to offer in evidence as soon as I can have it typed, that portion of pages 24 and 25 of part 3 of the report of the Federal Trade Commission of 1918, showing only the first column, which is the stock yards, and then the Swift interest therein.

Mr. Smith: Mr. Examiner, in view of that offer of part of what the defendants offered at the last hearing and later withdrew without prejudice, inasmuch as Mr. Rynder is now offering part of that showing, defendants offer the entire section 6 of part 3 of the report of the Federal Trade Commission on the meat packing industry, which begins on page 21 and covers that page and a number of pages following. I except from that offer, because of the difficulty of reproducing it, the map that appears between page 26 and 27. I am excepting that. I may state, however, I have no objection to the map being made part of the record. I ask for authority to have this part which I am now offering copied and made part of the record as quickly as the work can be done. Off the record.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Mr. Rynder, the remarks which you made following Mr. Smith's statement of his offer are not on the

[fol. 849] record. Do you want to repeat those remarks? I do not think it is absolutely necessary.

Mr. Rynder: No. I do not think it is necessary.

Exam. Carter: Very well, gentlemen. You will file those with the Commission within 25 days.

Mr. Smith: To make my offer more specific, if you please, I am offering that part of the report of the Federal Trade Commission on the meat packing industry, part 3, which is to be found on pages 21 to 85 inclusive except the map between pages 26 and 27 and except also the information on pages 24 and 25 which Mr. Rynder is offering. In other words, with reference to pages 24 and 25, we are not relieving Mr. Rynder of offering in evidence that table to make his testimony relevant, but I am offering anything in connection with that that he fails to offer.

Mr. Rynder: I want to ask Mr. Chaplin a question in that connection.

By Mr. Rynder:

Q. Mr. Chaplin, I would like to ask you if officers, agents or auditors of the Federal Trade Commission came in and for this purpose examined all of the books, records, memoranda and other papers of Swift & Company.

A. Yes.

Q. Did they make a thorough examination?

A. Yes, sir. They had access to whatever they wanted.

Q. I mean, were they there for many days?

[fol. 850] A. Yes.

Q. Approximately how long were they there?

A. They were there for months.

Mr. Smith: May I be permitted to furnish what I last outlined, Mr. Examiner?

Exam. Carter: Yes.

Mr. Smith: Thank you.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. Have you read pages 189 to 277 of part 3 of the report of the Federal Trade Commission on the meat packing industry dated Washington, D. C., June 28, 1919?

A. Yes, sir.

Q. I call your attention to the portion of the report at pages 193-194 reading as follows: "It is this evidence, coupled with the fact the records of the Maine Company disclosed a lack of regularity in the handling of certain treasury bonds of the company, which gives rise to the surmise the demands of these packers may have been partly satisfied by the receipt of these bonds." I will ask you whether or not Swift & Company or anyone on its behalf obtained any part of the bonds or securities of the Maine Company referred to in said report.

Mr. Smith: That is objected to on the same grounds my other objection rested on. It goes beyond the foundation laid and the qualifications of the witness to answer.

Exam. Carter: I will sustain the objection.

[fol. 851] By Mr. Rynder:

Q. Do the books and records of Swift & Company show that the company or anyone on its behalf ever obtained any part of the bonds or securities of the Maine Company referred to in said report?

A. No, sir, not to my knowledge.

Mr. Smith: I am not quite clear. I assume you are again excepting the bonds that were received upon the execution of this 1892 contract which is in evidence here.

The Witness: Yes, sir.

Mr. Rynder: Oh, no. You misunderstood me. I meant——

The Witness: You meant subsequent?

Mr. Rynder: I meant the bonds that were issued, of the Maine Company—I will find this portion for you in here.

By Exam. Carter:

Q. Mr. Chaplin, what bonds did Swift & Company receive?

A. The bonds in connection with the agreement of 1891.

Q. Were there two sets of bonds in that agreement?

Mr. Rynder: No. If I can review it briefly, exhibit No. 47 provided for the payment of certain income bonds to bear certain interest, the principal to be paid on July 1, 1907.

Exam. Carter: That agreement provided those should be

paid to whom? Did it provide they should be to the individuals and not the companies?

The Witness: To the company.

By Exam. Carter:

Q. To Swift & Company?

[fol. 852] A. Yes, sir.

Q. They were bonds of what company?

A. Of the Chicago Stock Yards Company.

Q. Were they the holding company, the Maine Company?

A. No.

Mr. Rynder: The New Jersey company.

Exam. Carter: The New Jersey company?

Mr. Rynder: You testified that those were not paid.

Exam. Carter: In other words, is this correct:

By Exam. Carter:

Q. The contracts provided for the payment of certain bonds of the New Jersey Company to Swift & Company, among others, is that correct?

A. Yes.

Q. Did that agreement also provide certain bonds of the Maine company were to be paid certain individuals?

Mr. Rynder: No. That is the second story. This contract which is exhibit 47 provided—you will have to read the whole contract to get the terms of the bond issue, and the occasion for it—but it provided for the issuance of three million dollars of so-called income bonds on which interest was to be paid with certain restrictions as to prior bond issues and preferred stock, until July 1, 1907, at which time the principal sum of these bonds was to be paid off at par. Mr. Chaplin has testified that the contract was carried out by the stock yards company; that no new contract was ever made in place of it; and that thereafter Swift & Company [fol. 853] received no money from the Union Stock Yard and Transit Company.

Mr. Smith: I object to that statement; I object to the statement that is what the witness testified to, as not being in accordance with the fact. I simply call attention to it, so there will be no misunderstanding about it.

Mr. Rynder: Now, we come to another thing which is part of the Federal Trade Commission report offered by Mr.

Smith dealing with the Chicago stock yards. That is exhibit No. 59. As I understand it, in general, that report sets forth that there was formed a Chicago Stock Yards Company of Maine, which took over certain securities of the stock yards company of New Jersey, and that the Federal Trade Commission had not been able to trace the disposition of some of those bonds. They make no finding that Swift & Company ever received any of those bonds. Referring to some report—I do not know just what it is—they say: "It is this evidence coupled with the fact that the records of the Maine company disclose a lack of regularity in the handling of certain treasury bonds in the company, which gives rise to the surmise that the demands of these packers have been partly satisfied by the receipt of these bonds." The report closes with a description of the financial conditions of the companies connected with the Chicago stock yards and controlled by Prince and Armour. [fol. 854] Mr. Smith: What is the purpose of this statement, Mr. Examiner? I do not know as I have any particular objection to it, but I would like to know what the purpose is.

Exam. Carter: I think he is trying to answer my question. I asked a question about it.

Mr. Rynder: I think so; there were two separate things here.

Exam. Carter: Yes. I think I have it clearly in mind now, Mr. Rynder. The bonds of the Maine company are referred to in the Federal Trade Commission report and the bonds which this witness testified had been paid and had matured are those referred to in the contract.

Mr. Rynder: That is right. I want to say, if I may make one final statement here, without taking up too much of your time, that in that part of the report I have been referring to which is exhibit 59, no one states directly that Swift & Company ever received any of those bonds of the Maine company. I am asking Mr. Chaplin whether the books of Swift & Company show that it ever received any bonds of the Chicago Union Stock Yards Company of Maine.

The Witness: No.

By Mr. Rynder:

Q. According to the books they received no bonds of that character?

A. No, sir.

Q. Does that answer include the so-called bearer war-
[fol. 855] rants mentioned in the same report?

A. It does.

Q. You mean that Swift & Company never received any of the so-called bearer warrants that are mentioned therein?

A. That is correct.

Q. Can you state from your knowledge of the books of Swift & Company whether it owns any securities directly or indirectly of the following companies: the Union Stock Yard and Transit Company of Chicago, an Illinois corporation; The Chicago Junction Railways and Union Stock Yards Company of Chicago, a New Jersey Corporation; the Chicago Stock Yards Company of Maine, a Maine Corporation?

A. No. Swift & Company does not own any of the stocks of those companies.

Q. Or any other securities?

A. Or any other securities.

Q. In offering the report of the Federal Trade Commission concerning the Chicago stock yards—that is exhibit 59—counsel for the defendants made the following statement as to why it is relevant: "The Commission finds that Swift & Company actually obtained no stock in the Maine company, that stock being all taken, apparently, by Mr. Prince and his family and by Philip D. Armour. But, the Commission does find that it was unable to trace a very large amount of bonds that were exchanged in the transaction [fol. 856] and it leaves room for the surmise that some or all of the other big packers participated in the distribution of those bonds, so that however long this arrangement may have been continued, if indeed it has been terminated now, this report shows that throughout a long period of years, partly by this contract and partly by what the report shows as to the situation thereafter, there was an arrangement between some or all of the big packers and the yards company as a result of which the packers received in some form or other compensation in return for continuing to use the stock yards service of the Union Stock Yard and Transit Company of Chicago." Is that statement true?

Mr. Smith: That is objected to as immaterial.

Mr. Rynder: I do not think it is immaterial.

Mr. Smith: The question is, what is in these reports? I made a statement about them at the time they were offered, and Mr. Rynder declared that the statement was inaccurate.

He said among other things, it was his understanding that the bonds provided for in the contract had never even been paid, although I think he did not make that statement on the record, and declined to put it on the record. I believe the statement that was made there, which has just been read, to be true and correct, but whether it is or not, it was based upon a reading of this report which is now in the record, and the report is the best evidence of what it contains, or any question with reference to it. What counsel [fol. 857] may have said about it is immaterial. Mr. Rynder and I both agreed at the conclusion of that hearing—whether it is on or off the record I do not know—that the statements of counsel were not to be taken as statements of fact, although I again affirm what I said, which I believe is based upon and supported by the evidence of record.

Exam. Carter: I will sustain the objection.

Mr. Rynder: Sir?

Exam. Carter: I will sustain the objection.

Mr. Rynder: Mr. Examiner, I am very sorry——

Exam. Carter: The Commission is not going to accept the statements of counsel on either side as statements of fact.

Mr. Rynder: All right. I will withdraw that question.

Exam. Carter: Proceed.

By Mr. Rynder:

Q. So far as the books of Swift & Company show, has Swift & Company owned any securities in the Union Stock Yard and Transit Company or its affiliated or allied companies, or received any compensation in any form whatsoever from the Union Stock Yard and Transit Company or its affiliated or allied companies after July 1, 1907?

Mr. Smith: May I hear that question read, please?

Exam. Carter: Read the question.

(Question read.)

A. Not to my knowledge.

By Mr. Rynder:

Q. Was your knowledge of the books complete?

A. Yes, sir.

[fol. 858] Q. Referring to the ownership of certain packing companies, and certain stock yards as of the date of the

Federal Trade Commission report, on June 28, 1919, I call your attention to the portions of that report which has just been offered in evidence by counsel for defendants, commencing at page 21 and I think running through page 85 of the report of the Federal Trade Commission.

A. Yes.

Q. Have you read that portion of the report recently?

A. Yes, sir.

Q. Were you acquainted with the books, records and other documents of Swift & Company at the time that report was made?

A. Yes, sir.

Q. I call your attention to the fact there has been offered in evidence as exhibit No. 62, what is commonly called the consent decree entered at Washington, February 27, 1920, in the Supreme Court of the District of Columbia, of which paragraphs Nos. 2 and 10 relate to the ownership by Swift & Company and certain affiliated or subsidiary companies and certain individuals of securities of certain public stock yards.

A. Yes.

Q. Can you from your own knowledge tell me first what action was taken to carry out the terms of the consent decree so far as the Swift defendants therein were concerned?

A. Well, a plan of handling the stock was worked out, I [fol. 859] think it was, in 1921, and it was submitted to the court and approved. An escrow agreement was made with the Illinois Trust & Savings Bank to hold the stocks and the court appointed trustees with power of attorney to vote the stocks.

Q. Do you recall the names of those trustees?

A. I believe H. R. Anderson and George Sutherland.

Q. Sutherland?

A. Sutherland. That is correct.

Q. He is the same George Sutherland who was later appointed to the United States Supreme Court?

A. Yes, sir.

Q. What was the next step following that order of the court?

A. Later on, I think it was in 1925, we brought suit in the Supreme Court of the District of Columbia to have the decree set aside, which the court did, and the stocks——

Q. Just a moment, please.

A. Yes.

Q. Just to refresh your recollection there, was that on May 1, 1925?

A. I beg your pardon?

Q. I say, to refresh your recollection, was that on May 1, 1925?

A. I believe it was.

Q. Go ahead.

A. And the stocks were then returned to us and remained [fol. 860] in our possession for a number of years, I believe until 1932, when the Supreme Court of the United States reversed the decision of the Supreme Court of the District of Columbia and ordered the court to reinstate the decree. The court appointed H. S. New as trustee to both the stocks and also with power to sell. Between 1932 and 1936 conditions were so bad financially in the financial world it was not possible to make a sale, but in 1936 Swift & Company negotiated a sale with John De Witt. This sale was approved by the court and the stocks were delivered on November 2, 1936, in exchange for cash.

Q. Did Mr. De Witt form a corporation to take over those stocks, and if so, what was it?

A. Yes, sir, the United Stock Yards Company. I would like to mention that there were three—the stock of three stock yards that was not included because we could not agree on a price; the stock of the Jersey City stock yards, the Newark stock yards and South St. Joseph stock yards.

Q. As to those three just mentioned by you, is the stock of the Swift group as mentioned in the consent decree still in the hands of the trustee with power to sell?

A. Yes, sir. Mr. New died in 1937, and John Walsh was appointed trustee with power to vote the stock and also authority to sell.

Exam. Carter: Just a moment, there.

By Exam. Carter:

Q. What is this stock that was sold by John De Witt? [fol. 861] A. All of our holdings except three, the Jersey City stock yards, the Newark stock yards, and South St. Joseph stock yards. I would like to add that we own no stock or securities in the United Stock Yards Company.

By Mr. Rynder:

Q. The formation of that company and all the terms and conditions of the sale have been approved by the United

States Supreme Court of the District of Columbia and the department of justice of the United States?

A. Yes.

Q. Is that correct?

A. Yes.

Exam. Carter: Have you a reference to that proceeding in which they approved that, Mr. Rynder?

Mr. Rynder: No.

Exam. Carter: You do not know the title?

Mr. Rynder: It was not in a case, Mr. Examiner.

Exam. Carter: I see.

Mr. Rynder: If we have time before we leave, I can get you—it is just typewritten—Mr. Chaplin's stated that the consent decree has been suspended by the Supreme Court of the United States—or rather, I mean by the Supreme Court of the District of Columbia. You will not find that, I think, in the printed volumes, but the reversal of that decision by the Supreme Court of the United States, will be found at 286 U. S. 105.

[fol. 862] Exam. Carter: Was it in the District Court in subsequent proceedings?

Mr. Rynder: Yes; only in 1936. This decision I have recited to you would be 1932. Mr. Chaplin explained to you why sales could not be made. It was difficult to make them in the meantime; and the order to which I referred was simply an order setting out the entire program of selling, and at one time I think it prevented everybody, even a fourth cousin, from owning any of the stock of the new corporation, and so forth.

Mr. Smith: What is the citation on that?

Mr. Rynder: I do not know. It is a typewritten order that was approved by the Supreme Court of the District of Columbia and by the department of justice.

Exam. Carter: Would that order be entered in the proceedings dealing with the consent decree?

Mr. Rynder: Yes, sir.

Exam. Carter: I see.

Mr. Rynder: It was entered along in the fall of 1936, after this agreement had reached the point where they had to know whether or not the court and the department of justice would approve it. The order was drawn up first in the Swift office and then presented to the department of justice and then finally put in form so the court could

approve it. That does not exist except as part of the con-
[fol. 863] sent decree, except in temporary form.

Mr. Smith: Mr. Examiner, the witness has testified about the terms of the trust arrangement under which the stock of three of these companies is now held. Of course, his statements about that are not the best evidence. I would like to have an opportunity to examine that trust agreement if anything is to be testified about it. I do not know whether it contains anything of interest to this case other than what has been said about it, but if we are not to have the best evidence, I should be permitted to verify by the best evidence, by the document itself, what the witness has said about it. I assume it is available here. I would like to see it.

Exam. Carter: Do you have it, Mr. Rynder?

Mr. Rynder: I object. It is utterly irrelevant. I take it the agreement would show that Swift & Company——

Exam. Carter: I think what Mr. Smith is interested in is verifying what the terms of the agreement are, is that not it?

Mr. Smith: Yes. That is right.

Exam. Carter: I mean, he objects to the witness describing what the terms of the agreement are, for the purpose of the testimony that he has given.

Mr. Rynder: Well, for the purpose of these questions, I am willing to admit what is not the fact, that we own 100 per cent of the stock yards at each place.

Mr. Smith: And control their policies?

[fol. 864] Mr. Rynder: What?

Mr. Smith: Then necessarily, you control their policies?

Mr. Rynder: No. We do not control the policies of any of them. I think it is just a snooping expedition.

Mr. Smith: If a 100 per cent stockholder does not control the policy of the company, I would like to know who does.

Mr. Rynder: I do not think that the legal right of this company—they seem to think we are on an excursion all around the world. Our objective is Chicago. We have reached it now. They would like to go to South America, Paris and Africa.

Mr. Smith: Mr. Examiner, the witness has just testified as to what this trust agreement provides. He said it turned the stock over for voting purposes and what-not. The record will show what he said. It is not the best evidence. I would like to see the document. I do not say it has to be

produced here for submission in the case, but I want to see it. That is the best evidence. How can counsel say it is immaterial when he has had his witness testify about it?

Exam. Carter: I think if you want that testimony in, Mr. Rynder, Mr. Smith is entitled to examine that document. I do not know that it is material to this issue, whether Swift owns the stock of these other stock yards companies or not.

Mr. Rynder: Your Honor believes it might be material to this issue?

Exam. Carter: No.

[fol. 865] Mr. Rynder: That we own stock in the Jersey City stock yards company?

Exam. Carter: No. I say, I do not believe it is material to the issues. As I understand it, you retained the stock of the three stock yards, those located at Jersey City, Newark and South St. Joseph.

Mr. Rynder: That is right.

Exam. Carter: Is that correct?

The Witness: Yes.

Mr. Rynder: That is right.

Exam. Carter: That is, under this trustee proposition.

Mr. Rynder: Yes.

Exam. Carter: Now, you have had this witness testify as to the terms of that agreement under which the trustee holds those properties. I say that I do not believe it is material to this issue, but you have had him testify to that effect and had him testify as to the terms of that agreement. Now, if you have him testify as to the terms of the agreement Mr. Smith is entitled to see the agreement. That is what I mean. I do not think it is material to this issue.

Mr. Rynder: Well, I will see if I can arrange during the lunch hour, if our general counsel is willing, to let Mr. Smith go over there and look at the trust agreement. I have no copy of it. It is an order of the court in typewritten form. It is not exactly a trust agreement. It is an order of the court.

[fol. 866] Exam. Carter: I think Mr. Smith is entirely correct in his position. If you have the witness testify as to what that order of the court contains, he is entitled to see the order of the court.

Mr. Rynder: I may say this: I am so convinced it is immaterial, I think I am willing to withdraw the testimony of this witness and say that, for the purpose of this case, I

think it is immaterial and does not matter if we own 100 per cent of those three stock yards without any agreement.

Mr. Smith: I still want to see the agreement now that it has been referred to on the record.

Mr. Rynder: I am so confident of my legal position I will waive the testimony as to those three. I thought we would put it in so the whole story would be told here. I made the statement at Washington without a chance to see any of the documents and when I got back I found it was slightly inaccurate. Of course, there is no reason—I think the thing will have to be determined whether this evidence is material or not. Mr. Smith is overlooking a lot of stuff of that kind, of course, which he is not requiring me to file, if this is material in any sense. The only thing of which I have a copy here is the consent decree. I would then proceed to ask a man informed about it, what steps followed that consent decree. Not as a witness, but as counsel informed upon the matter, I say to you that during that long period there were small lot shares purchased by retired people who wanted to buy [fol. 867] some of these stocks. In every instance that first had to be sent to the trustee and then the sale approved by the court of the District of Columbia. The file is piled up that high (indicating) since that consent decree went into effect, with orders involving 10 shares or 20 shares or 30 shares of stock that had to be approved, each person filing an affidavit that he was not connected with the company in any respect as officer, stockholder or otherwise. He had to certify to all of that in order that he might buy 10 shares of the stock. That story of the first arrangement was told without objection. The story of the final sale to the United Stock Yards Corporation was told without objection. However, if that whole thing which is a matter of public knowledge has to be put in this record, we might as well move back to Washington for the winter.

Mr. Smith: I have not said anything about putting it in the record, counsel. You have made that suggestion yourself. If the Examiner please, he is referring to a document here which is a public court record. I say I want to see it. He has it in his possession. He says he will withdraw this evidence rather than let me see it. I still want to see it.

Mr. Rynder: The evidence as to those three stock yards.

Exam. Carter: Gentlemen, we will adjourn until 2 o'clock. Your last request is this, that you want to withdraw, or you want to have stricken from the record all evidence relating

[fol. 868] to the stock yards at Newark, Jersey City and South St. Joseph?

Mr. Rynder: That is right.

Exam. Carter: Is that correct?

Mr. Rynder: Yes.

Exam. Carter: And in which you have referred to the sale of stock of other stock yards companies pursuant to this order of court?

Mr. Rynder: Yes. There is no objection made at the time.

Mr. Smith: We are going to either have an explanation of this consent decree which counsel has offered—he offers the consent decree, and then he has undertaken to show there has been compliance with the consent decree. He offers it in the face of the fact we offered it at Washington and because of his statements with reference to the consent decree having been entered, with which I was not as familiar as I should have been, I withdrew that. Now he offers the consent decree. He offers evidence with reference to the Chicago situation and he refers in his testimony to certain documents. I want the opportunity to see those documents. I not only want to see this last trust agreement, but I want to see the original trust agreement in which Mr. George Sutherland and Mr. Henry Anderson were trustees, or to which they were parties.

Exam. Carter: Well, we will now adjourn. I might say, before we do adjourn, that unless you do produce that, we will have to disregard your evidence relating to what has [fol. 869] been done under the trust agreement. We will adjourn until 2 o'clock P. M.

(Whereupon, at 11:30 A. M., Central Standard Time, adjourned until 1 o'clock Central Standard time.)

Afternoon Session 1 P. M.

Exam. Carter: Come to order, gentlemen. Have you gentlement decided what you are going to do about this consent decree?

Mr. Rynder: Well, I have filed a copy of the consent decree. As I recall it, thereafter there was an order approving a plan. Then there was the order appointing Anderson and Sutherland. Then there was the interim period while the case went to the Supreme Court, and then the appointing of New, who died; then the order appointing Walsh. There are copies of those in the office of our general counsel,

Mr. Veeder, but owing to the fact his clerk who knows where they are and all about them will not be back until Wednesday, this is one offer that I make: that Mr. Douglas Smith may examine those orders and if he says he is satisfied by his own examination, he may examine them at that time in Mr. Veeder's office. The other offer I make is that reasonable time be allowed here to obtain certified copies from the clerk of the district court of the District of Columbia.

Mr. Smith: I am satisfied with either one of those offers. I would be glad to look at those documents in Mr. Veeder's office as you suggested, with the understanding that if I [fol. 870] desire, I may produce copies of them and offer those copies for the record. If counsel for Swift & Company does not want to let the documents get out of their office, and after an examination of them it should be desirable to put them in the record, we could bear the expense of having them copied and they could then be compared with the originals in Mr. Veeder's office and presumably it would not be necessary to get certified copies. I will be glad to accept that offer if I may have an opportunity within a reasonable length of time, 10 or 15 days after the close of this hearing, to submit copies if it should seem desirable to do so.

Exam. Carter: That is apparently satisfactory. That disposes of that matter. Permission will be granted to file those copies, if you should feel you want to do so.

Mr. Rynder: I should say that there are in those files in addition to the orders, memoranda of the ownership of a certain number of shares by so-and-so, and so many others by so-and-so, and so forth. I assume there is no reason to make that a matter of public record.

Mr. Smith: I did not understand what you said there are.

Mr. Rynder: Well, I mean to say that the original report to the court and from subsequent reports to the court will show that Mr. L. F. Smith owned so many shares, and maybe his daughter-in-law owned a certain number of shares and his son owned a certain number of shares, and [fol. 871]so forth. I do not suppose Mr. Smith contemplates it being necessary to see the detail as to the ownership of a particular individual.

Mr. Smith: Is that detail in these very documents we are talking about, so I would have to delete part of it?

Mr. Rynder: Oh, no. You would not have to delete it. There is a report by the court showing the entire ownership.

These various orders I have mentioned in and of themselves do not show that.

Exam. Carter: You mean, the report to the court——

Mr. Rynder: Shows that.

Exam. Carter: ——on which the order is based in part?

Mr. Rynder: Shows that.

Exam. Carter: Is that what you mean?

Mr. Rynder: Yes. Then the court entered an order appointing a certain trustee to take over the stock named in a certain prayer, and all of that.

Mr. Smith: With reference to these documents that show the duties of the trustees, have they any of this material in them you are now speaking of?

Mr. Rynder: No. I do not think the orders of the court have, but the orders of the court refer, and then direct that all of the stock be endorsed to this trustee and so forth, as stated in the prayer accompanied by this report.

Exam. Carter: Well, suppose we put it this way: if Mr. Smith desires to file copies of these orders, he may do so, [fol. 872] and if he desires to file any data in connection with those orders, you will take the matter up with me.

Mr. Smith: All right.

Exam. Carter: And if there is any objection, you will take the matter up with me and I can rule on it that way. Will that be satisfactory?

Mr. Rynder: That is satisfactory.

Mr. Smith: That is satisfactory.

Exam. Carter: Very well. Proceed.

Mr. Rynder: I do not know whether he will make the same objection or not, but I want to ask Mr. Chaplin one more question.

Exam. Carter: Very well. Proceed.

JOHN M. CHAPLIN having been previously sworn, resumed the stand and testified further as follows:

Direction examination (Cont'd).

By Mr. Rynder:

Q. I will ask you, Mr. Chaplin, whether Swift & Company has since the date of the Federal Trade Commission report sold its private refrigerator cars?

A. Yes, sir.

Q. Do you know to whom they were sold?

A. General American Tank Car Company.

Q. Do you know whether Swift & Company according to its books has any interest in the General American Tank Car Company?

[fol. 873] A. It has no interest.

Mr. Rynder: That is all.

Exam. Carter: Does that complete his direct examination?

Mr. Rynder: Yes.

Exam. Carter: You may cross examine.

Cross-examination.

By Mr. Smith:

Q. When did you retire, Mr. Chaplin?

A. December 23, 1937.

Q. You are on pension now, I take it?

A. Yes, sir.

Q. What date did you become comptroller of Swift & Company?

A. In 1923, I believe. I do not remember the month.

Q. You do not remember the month?

A. No.

Q. And it was from 1899, then, to 1923 that you held the one job of manager of some department of the accounting organization?

A. Yes.

Q. What was that job? What was its title?

A. Plant accounting department.

Q. Plant accounting department?

A. Yes.

Q. As head of that department—or rather, let me ask you this: you held that one job throughout that period of 24 years, did you?

A. Yes, sir.

[fol. 874] Q. What other departments are there in the Swift accounting organization?

A. Well, there is what we call the produce accounting department that handles the plants that it represents, eggs, poultry, butter, and so forth. There is the fertilizer accounting department that handles the fertilizer plants.

There is the branch house accounting which handles the distributive branch. I think that is about all.

Q. Now, the stock yards accounts were handled by the individual companies, were they?

A. Yes, sir.

Q. Located at the various markets?

A. Yes, sir.

Mr. Rynder: I am not sure I understand what you mean by that.

The Witness: Well, each stock yards kept a set of books at the stock yards.

By Mr. Rynder:

Q. As stock yards books?

A. Yes.

Mr. Rynder: Go ahead.

Mr. Smith: Thank you.

By Mr. Smith:

Q. Those stock yards either made or lost money and reported the results of their operation directly to their parent company, did they?

A. Yes, sir.

[fol. 875] Q. To whom were those reports made in the Swift organization?

A. They were made to the general office manager, and later, the same job under a different name, to the comptroller.

Q. When was the change made from the general office manager to the comptroller? It was a change of title, was it not?

A. In 1923.

Q. That was in 1923?

A. Yes.

Q. It was a change of title, was it?

A. Just a change in the title. The duties were the same.

Q. So it was in 1923 that those reports began to be made first to you; when you took the job of comptroller?

A. Yes, sir, except that I had general supervision over those accounts.

Q. Over what accounts?

A. Auditing the stock yards companies that we controlled or that we managed.

Q. What kind of reports did these stock yards make to you?

A. Balance sheets; loss and gain statements.

Q. Well, I thought you said you took over that phase of the work in 1923.

A. Yes, but these reports were coming in.

Q. Yes.

A. And they were acceptable to my department.

Q. Yes.

[fol. 876] A. My men did some auditing on them.

Q. You said several times that reports were acceptable to you.

A. Yes.

Q. You mean by that that any report you wanted to look at you were permitted to look at?

A. Yes, sir.

Q. You had traveling auditors under you, did you?

A. Yes, sir.

Q. In connection with your work as plant accountant.

A. Yes, sir.

Q. I think you said it was some of those plant accountants that made some inspection of the private accounts of certain of the officers?

A. Yes, sir.

Q. Why was that done?

A. Well, they preferred to have their own auditors check up their books rather than have outside auditors do it.

Q. These stockholders had certain private business relations, did they?

A. Yes.

Q. And they had their books maintained by somebody charged with the duty of so doing?

A. Yes. They had a secretary.

Q. I beg your pardon?

A. Their secretary.

[fol. 877] Q. I see.

A. And bookkeeper.

Q. Then periodically they would ask that one of your traveling auditors look over the work of the secretary?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. That is the auditing of these stockholders' records you discussed this morning?

A. Yes, sir.
Q. Is it?
A. Yes, sir.
Q. Did they have that done prior to the federal income tax law?
A. Yes.
Q. For the purpose of satisfying themselves that their respective secretaries had properly kept their respective books?
A. And accounted for the property and money that was entrusted to them.
Q. Yes. Certain properties and moneys were entrusted to these various secretaries, were they?
A. Yes.
Q. What stockholders are you speaking of?
A. The Swifts.
Q. Gustavus Swift?
A. Yes.
[fol. 878] Q. When did he die?
A. I think it was in 1902.
Q. That was three years after you went to Chicago?
A. Yes.
Q. Do you recall whether one of your auditors ever looked at Mr. Gustavus Swift's books?
A. Well, I could not say his books were checked, but as to whether, during the time when I came to Chicago in 1902—whether it was my auditor that did it, I do not know.
Q. What information came to you, if any, with reference to these checks that were made of the books of these stockholders by these traveling auditors, would be something your traveling auditors said to you about it?
A. Well, they would make a written report.
Q. Did you find errors made by the secretaries occasionally?
A. Well, I do not recall.
Q. You do not recall about that?
A. I presume so.
Q. Who made those reports? What traveling auditors made those reports, we will say, from 1900 to 1910?
A. You mean, the names of them?
Q. Yes.
A. I do not know that I can recall them offhand.

Q. How long since you have refreshed your recollection on those studies that were made at that time?

[fol. 879] A. Do you mean, as to the auditors who——

Q. No.

A. What do you mean?

Q. As to the contents of these books and what was in them. When did you go into that last, or did you ever go into it?

A. Well, only as I read the reports; I would say it has been probably five or six years since I have actually seen a report.

Q. Since you have seen the last report?

A. I would say that, yes.

Q. I see. It has been five or six years since you have seen the last report of that character that was made?

A. Yes.

Q. You did not have occasion to look at them after they were first made, I take it?

A. Well, as the man made his report he would give it to me and then I would turn it over to the Swift that was having his books audited.

Q. Did you have any purpose or desire to pry into the private affairs of the members of the Swift family as to what was in their personal accounts?

A. No, sir.

Q. You did not charge your mind with their own personal accounts for any purpose, did you?

A. No, sir.

Q. It did not concern you, did it?

[fol. 880] A. Well, only incidentally.

Q. You made a report to the Federal Trade Commission that was discussed here this morning, did you not?

A. Yes, sir.

Q. At their request?

A. Yes, sir.

Q. Did you make other reports to them?

A. Yes, sir.

Q. About that time?

A. Yes, sir.

Q. A number of them?

A. A great many.

Q. A great many?

A. Yes, sir.

Q. Some of them are embodied in the report you discussed here this morning?

A. You mean, that particular report?

Q. Yes.

A. No, sir. I do not think so.

Q. Have you examined the full report of the Federal Trade Commission?

A. Well, I have read it several times.

Q. Recently?

A. Not recently, no.

Q. Did they embody this report in their report just as [fol. 881] you made it? I mean, the one you gave to them?

A. Well, I did not check it to see that it was exactly the same.

Q. I see.

A. I assume they did.

Q. You have examined that in the last two or three days?

A. Yes, sir.

Q. And you think it is true and correct?

A. Well, I have no reason to doubt it.

Q. I think you said they came to Chicago and examined the books of Swift & Company; or did they merely ask for permission to examine them?

A. Oh, no. They had a large force of men in our office in Chicago for months. They had a force of 15 or 20 men.

Q. They did?

A. For a long time.

Q. How big a force?

A. 15 or 20 people.

Q. About when was that?

A. That was when the war was going on, 1917 or 1918, I think.

Q. So this report we have been discussing was made by the Federal Trade Commission subsequent to that time when they examined your books, was it?

A. Oh, yes. They examined the books, and then they made the report.

Q. I see. What was the amount of those bonds that Swift [fol. 882] & Company received from the Jersey Company?

A. As I recollect it, it was around a million dollars.

Q. It was what?

A. Around a million dollars. I do not recall the exact figure.

Q. You do not recall the exact figure?
A. No.
Q. That was put on the books of Swift & Company, was it?
A. Yes, sir.
Q. You have not examined that item lately?
A. No, sir.

Mr. Rynder: Is there any such item?
The Witness: On the books?
Mr. Rynder: Yes.
The Witness: My best recollection is that the item was somewhat less than a million dollars.
Mr. Rynder: I mean, he asked whether you had examined that item lately.
The Witness: No.
Mr. Rynder: I asked you if there was any such item.
Mr. Smith: All right. Let us find out.

By Mr. Smith:

Q. Is there any such item?
A. You mean—you are referring now to the bonds in connection with the 1891 agreement?
Q. Yes.
A. Yes. There was such an item.
[fol. 883] Q. There was.
A. Yes.
Q. You have seen it, have you?
A. The item on the books?
Q. Yes.
A. No. I do not recall that I saw it, that I saw the particular figures on the books.
Q. You do not recall that you did?
A. No.
Q. Well, you do not know whether it is on there or not, then?
A. I know that these bonds were received by Swift & Company.
Q. But you are not sure that there is any item showing their receipt?
A. I did not see any—I did not actually see the entry on the books.

Mr. Smith: All right.

Mr. Rynder: I would like to get this cleared up while we are on it. Counsel for the defendants asked if you had looked at that item lately.

The Witness: No.

Mr. Rynder: I think he meant to imply that there is some item on Swift & Company's books indicating some receipt from some source from the Union Stock Yards Company now.

The Witness: Now?

Mr. Rynder: Yes.

[fol. 884] The Witness: No. There is nothing on the books at present.

Mr. Smith: Your counsel misunderstood. You and I understood each other perfectly. I was inquiring about the bonds that were paid pursuant to the 1891 contract.

The Witness: Yes.

By Mr. Smith:

Q. You understood that, did you not?

A. Yes, sir.

Q. And you said that they had been received, but you did not know whether there was an item on the books or not?

A. No. You asked whether I had seen the item on the books.

Q. And you said you had not?

A. I had not seen it.

Q. Yes.

A. As a matter of fact, I did not come to Chicago until later on.

Q. What was put on the books before 1899 you are not sure of?

A. No, except the fact that we received these bonds.

Q. Yes. What interest did Swift collect on those bonds issued under the 1891 contract, do you know?

A. No. I could not say at this time. I believe the interest was dependent upon certain conditions in the contract.

Q. Yes.

A. What they actually collected, I do not know.

Q. Would you be able to tell us now from what source any of the stockholders of Swift & Company received all of [fol. 885] the income that came to them during the years 1900 to 1920, for example?

A. You mean, the source of the income?

Q. Yes, that came to the——

A. Of the individuals?
Q. Yes.
A. No. I could not tell you that.

Mr. Smith: I think that is all.
Exam. Carter: Are there any other questions?
Mr. Rynder: Yes.

Redirect examination.

By Mr. Rynder:

Q. Mr. Chaplin, did these individuals that have been mentioned, the individual Swifts who were either officers or directors of Swift & Company, have any investments entirely aside from the packing plant?
A. Yes, sir.
Q. I take it it was none of your business to know if one of the Swifts bought himself something, a home or a new automobile, or something of that kind?
A. No. I had nothing to do with that. I merely had to check up their books when requested, and make a report.
Q. I still want to revert to this question about an item. I did not quite understand that. Since you first had a chance to become familiar with the books of Swift & Company, which I believe you said was in about 1899, have you seen any entry indicating any income by way of interest upon [fol. 886] bonds, dividends upon stocks of any other form of ownership of Swift & Company in the Chicago stock yards or any of its affiliated companies?
A. No.
Q. Is it your understanding that those books are kept truly and accurately?
A. Yes, sir.
Q. Was there ever a time when they were allowed to be falsified or do other than state truthfully the business that was going on?
A. No, sir.
Q. If there was any income from other stock yards companies, such as was mentioned in the Federal Trade Commission report, did those items appear ultimately in the books of Swift & Company?

Mr. Smith: That is objected to on the ground that no foundation has been laid. This witness has testified pretty

clearly what his duties were with respect to the books with which he was concerned.

Mr. Rynder: I think it is a fair question.

Exam. Carter: Read the question.

(Question read.)

By Exam. Carter:

Q. Do you know whether they did or not?

A. If they were received by Swift & Company, they would appear on the books.

Q. Are they the books that you had supervision over?

[fol. 887] A. Yes, sir.

Mr. Smith: During what years?

By Mr. Rynder:

Q. What I mean to say is, that if you held a certain percentage of stock in the St. Paul Stock Yard Company and at the end of a certain period that company declared a dividend, thereby making the payment of a dividend to Swift & Company, did that appear in your books?

A. Yes, sir. It was my duty to see we received a dividend of that nature.

Q. Was that true as to every other interest that you held, by way of investments?

A. Yes, sir. It was our job as comptroller and as general office manager to see that any dividends or interest due us or anything else due us was duly collected and recorded on the books.

Q. That was true as to all of the stock yards companies in which you had an interest?

A. Yes.

Q. Is that correct?

A. Yes, sir.

Q. The books of Swift & Company did show notations of the amounts received by way of dividends?

A. Yes, sir.

Mr. Rynder: I think that is all.

Exam. Carter: Are there any further questions of Mr.

[fol. 888] Chaplin?

Mr. Smith: Yes.

Recross examination.

By Mr. Smith:

Q. Following the entry of the consent decree you testified about some of the events that occured subsequent to that.

A. Yes.

Q. Was any change made in the personnel of the yards companies as a result of that consent decree, and if so, what?

A. So far as I know there were no changes.

Q. The same officers continued in control?

A. I believe so.

Q. Mr. Rynder, for example, acted as counsel for the St. Joseph stock yards, did he not, in a proceeding before the Secretary of Agriculture?

Mr. Rynder: I do not know whether Mr. Chaplin knows that.

The witness: I do not know.

Mr. Rynder: I will admit it.

By Mr. Smith:

Q. You do not know?

A. No.

Q. You do know, do you not, that the same relationship existed between the officers of Swift and the officers of these yards after the consent decree, that existed before, is that not so?

A. Yes. The management, the general management continued the same.

[fol. 889] Q. Yes. You spoke about the St. Joseph yards and one or two others not having been sold because Swift & Company did not think the price that had been offered for those yards was adequate.

A. Yes.

Q. Does that reflect the interpretation of Swift & Company of the consent decree, that they can hold on to these yards until they are offered a price which in their judgment they deem adequate?

A. No. We have not the power to do that, except that the court stated that they thought we were entitled to a fair price, and the court was not willing to approve the sale at a price that was not reasonably fair.

Q. As to those yards, in effect you convinced the court you should not be required to sell them, but ought to be, for the present at least, permitted to retain them?

A. Yes, sir.

Q. You still do own the stock of those companies?

A. Yes.

Q. That you mentioned.

A. Yes.

Mr. Smith: That is all.

By Exam. Carter:

Q. Those companies are operated by the same officers?

A. Yes, sir.

[fol. 890] Mr. Rynder: I would like to ask Mr. Chaplin just one or two more questions.

By Mr. Rynder:

Q. Mr. Chaplin, was an earnest effort made to sell the St. Joseph stock yards to the United Stock Yards?

A. Yes, sir.

Q. Was it not a fact that its earnings and income at that time were so low that United did not want to bring St. Joseph into its financial picture?

A. That is correct.

Q. It was not so much a case of Swift holding out, as United being unwilling to take them; is that not a fact?

A. Yes.

Exam. Carter: Let me ask you this question:

By Exam. Carter:

Q. Do you know what United Stock Yards Company bought from you?

A. Do I know that they bought stock?

Q. What stock yards did they purchase from you, the stock of what stock yards?

A. South St. Paul; Sioux City; a little South Omaha, I believe; Fort Worth; a small amount of National Stock Yards.

By Mr. Rynder:

Q. That is at East St. Louis?

A. Yes. South San Francisco. Cleveland. Bourbon Yards in Louisville. I do not recall any other at the moment. I think there are a few shares of Kansas City, and Portland.

By Exam. Carter:

Q. Do you know who the officers of that company are?

[fol. 891] A. No, I do not.

Mr. Rynder: The officers of what?

Exam. Carter: Of that company.

The Witness: United Stock Yards?

Exam. Carter: Yes.

The Witness: Yes.

Exam. Carter: Can you name them?

The Witness: There is W. K. Wright. He is president.

Mr. Rynder: Just a moment please, Mr. Chaplin, if you do not mind my interrupting.

The Witness: No.

Mr. Rynder: He has been made chairman of the board of directors two months ago. C. F. Topping has succeeded him as president. I telephoned over, if I may interpolate, during the lunch hour, to see if Mr. Topping could come over with their original prospectus, which shows just exactly the amount of stock purchased by them, just by way of showing the same thing Mr. Smith will find out at Mr. Veeder's office, but I found that Mr. Topping was out of town for the week. However, in the prospectus, if I can get a copy before this hearing is finally closed, there is a very complete setup.

Exam. Carter: Are there any further questions of Mr. Chaplin?

Mr. Smith: Just one second.

[fol. 892] By Mr. Smith:

Q. Mr. Chaplin, you referred to a number of yards in which Swift had an interest as shown in the report you made to the Federal Trade Commission, which has been embodied in exhibit No. 59—no; which has not been embodied in exhibit No. 59, but is to be furnished for the record.

A. Yes.

Q. You have referred also to a certain sale made to the General Stock Yards Company—is that it?

A. Yes, sir.

Q. When was that sale?

A. In August, 1936.

Mr. Rynder: Just a moment. You do not mean that. That is United Stock Yards Company.

The Witness: Yes. United Stock Yards Company.

Mr. Smith: I beg your pardon.

By Mr. Smith:

Q. Then up until 1936 did you continue the interest which you had in these several stock yards shown on page 24 of the report of the Federal Trade Commission on the meat packing industry, that is the table which you prepared for the Federal Trade Commission? Did you hold that interest then from the time of the consent decree up to 1936?

A. Yes, except that the number of shares might differ because I think there were some stock dividends, and perhaps we bought some or sold some.

Q. Yes.

[fol. 893] A. There were always more or less changes, but not material.

Q. They were not material?

A. No.

Mr. Smith: I think that is all.

Exam. Carter: Are there any further questions of Mr. Chaplin?

(No response.)

Exam. Carter: Are you going to want Mr. Chaplin any more?

Mr. Smith: I think we will not have any need for him, at least as far as I am advised.

Exam. Carter: He will be available if we should want him tomorrow, will he not, Mr. Rynder?

Mr. Rynder: Are you going to be available tomorrow?

Mr. Chaplin: Yes.

Mr. Rynder: All right.

Exam. Carter: If we need him.

The Witness: Yes.

Mr. Rynder: Yes.

Exam. Carter: You need not come back unless we need you, Mr. Chaplin. You are excused.

(Witness excused.)

Exam. Carter: Have you any further testimony, Mr. Rynder?

Mr. Rynder: Yes. I would like to recall Mr. Tally for a moment.

Exam. Carter: You have already been sworn, Mr. Tally.

[fol. 894] GEORGE F. TALLY, having been previously sworn, was recalled and testified further as follows:

Direct examination.

By Mr. Rynder:

Q. Your name is George F. Talley?

A. Yes.

Q. You have previously been sworn and testified in this proceeding?

A. Yes, sir.

Q. It was stated by counsel for defendants at Washington that a certain part of the Federal Trade Commission report of which you have pages 23 and 25 before you now——

A. 24 and 25.

Q. 24 and 25?

A. Yes.

Q. "I offer this part of the report subject to the reservation I have already made with respect to the relevancy of the situation at yards other than Chicago as relevant to and as rebuttal to the showing that Mr. Rynder has offered with respect to the situation at certain other markets. I think this report pretends to show that to some substantial extent the five big packers including Swift & Company have some voice, if not a dominant voice in the determination of the practices of the yard companies at other points." Now, will you state the yard companies as to which you put in exhibits showing that there was no charge for delivery [fol. 895] in connection with direct shipments?

Mr. Smith: What was that question, please?

Exam. Carter: Read the question.

(Question read.)

Mr. Smith: That has already been asked and answered. That is in the record.

Mr. Rynder: Well, it is in the record, but it is not taking up much space, to get a short comparison here.

Exam. Carter: He may answer.

By Mr. Rynder:

Q. Go ahead and answer the question, Mr. Tally.

A. Baltimore, Maryland. East Buffalo, New York. Benning, D. C. Cincinnati, Ohio. Cleveland, Ohio. Detroit, Michigan. Indianapolis, Indiana. Los Angeles, California. Louisville, Kentucky, Muncie, Indiana, Philadephia, Pennsylvania. Pittsburgh, Pennsylvania. Wichita, Kansas.

Q. Leaving aside the disposition of stocks under the consent decree, can you state the only one of those yards to which your exhibits referred, as to which even the Federal Trade Commission indicated an interest on the part of Swift & Company?

A. Cleveland, Ohio, is the only one shown that Swift had any interest in, of those I have named.

Mr. Rynder: That is all.

By Exam. Carter:

Q. How about Kentucky? Did not Mr. Chaplin mention the Bourbon stock yards at Louisville, Kentucky?

A. I beg your pardon. Louisville, Kentucky is shown on here.

[fol. 896] By Mr. Smith:

Q. It is the very first one, is it not?

A. Yes. Louisville, Kentucky.

By Mr. Rynder:

Q. Louisville and Cleveland would be your answer?

A. Yes.

Mr. Rynder: That is all.

Exam. Carter: You may cross examine.

Cross-examination.

By Mr. Smith:

Q. Is this correct then, Mr. Tally, that of the yards shown on this page in which Swift had an interest, you assert there

were only two at which a yardage charge was not made on directs?

A. No, sir.

Q. Is that another way to state it?

A. No. I stated that of the yards as to which I put in an exhibit showing there was no charge on directs, there were only two in the list in the Federal Trade Commission report in which Swift had any interest, Louisville and Cleveland.

Mr. Smith: We have said exactly the same thing.

The Witness: All right.

Mr. Smith: That is all.

Exam. Carter: You may be excused.

(Witness excused.)

Exam. Carter: Have you any further testimony you desire to present, Mr. Rynder?

[fol. 897] Mr. Rynder: I believe that is all the testimony I have to offer at this time, unless some new testimony shall be offered by defendants.

Mr. Smith: I will call Mr. Sperry.

Exam. Carter: Let me ask you this, Mr. Rynder: you put in copies of tariffs of the stock yards company filed with the Secretary of Agriculture as exhibit No. 3. That contains section 12. Has that section 12 been amended?

Mr. Rynder: Yes, but that was one of the things, when I was asking what the additional evidence would be that was going to be put in today, I mentioned as being one which I would not regard as evidence that had to precede my evidence. In other words, the present stock yards tariff not containing the section was one of the things counsel for defendants said he was going to offer.

Exam. Carter: Are you going to put that in?

Mr. Smith: Yes.

Exam. Carter: You also referred to the proceeding pending before the Secretary of Agriculture, in the previous hearing. Something has happened to that proceeding, has it not?

Mr. Rynder: Why, I put in an exhibit giving you all the information I have on that. I offered our intervention in that proceeding, and a letter I had received returning that petition for intervention. That is already in the record.

Exam. Carter: I mean, in 472.

[fol. 898] Mr. Rynder: They refused it.

Exam. Carter: As I understand it, from that letter, the yards company has filed a new schedule of charges, and docket 472, pending before the Secretary of Agriculture, has been suspended for the time being. Is that right?

Mr. Rynder: Perhaps Mr. Tyler could speak better on that. My understanding was it was entirely discontinued.

Mr. Tyler: No. The Examiner is correct in his statement.

Mr. Rynder: It has just been suspended?

Mr. Tyler: Suspended indefinitely.

Mr. Rynder: Indefinitely?

Mr. Tyler: Yes.

Exam. Carter: Mr. Rynder—I might ask first, is there any representative of Armour & Company present?

Mr. Rynder: I do not see any.

Exam. Carter: Would you have any objection to furnishing the Commission with a list of the owners, those owners of your stock who own 10 per cent or more; the owners of the stock?

Mr. Rynder: Of Swift & Company?

Exam. Carter: Yes.

Mr. Rynder: Well, I do not know just now, but I do not know why it is relevant.

Exam. Carter: We would like to have that information. You have stated, or attempted to show that Swift & Company does not own any of the stock of the yards company. The Commission would like to know whether any of the [fol. 899] owners of the yards company stock own stock of Swift & Company.

Mr. Rynder: Mr. Examiner, I could not answer that question in a year. I think counsel for the defendants is going to satisfy himself upon that point when he looks at this file. He will see there every share that is listed in the name of Swift, even some Swifts who were not enjoined by the consent decree. Please remember that that did not run to every person named Swift; just the officers, the directors and certain named individuals. We have more than 46,000 shareholders. There is no prohibition on any of them except those named in the decree from owning any stock they please, and it is none of our business what their investments are.

Exam. Carter: I do not know that you understood my question. My request—and it is a request only—in this proceeding is for the identity of stockholders of the Swift

& Company stock who own 10 per cent or more of that company's stock.

Mr. Rynder: I do not know that I have any objection to furnishing it. I will certainly have to consult my principals first. I just cannot see the relevancy, however.

Exam. Carter: Well, will you advise the Commission within say, 15 days with respect to that request?

Mr. Rynder: You mean, each individual and the amount of his ownership, the number of shares?

Exam. Carter: The identity of the individuals who own 10 [fol. 900] per cent or more of the stock of Swift & Company, and the percentage of that company's stock which they own. I do not care about the number of shares, but the percentage of that company's stock which they own.

Mr. Rynder: Would you not rather come up to our secretary's office and just look at that? I am not interested in it personally at all. What I mean is, apparently we have got to furnish every owner of the thousands of shares——

Mr. Smith: It cannot be over 10, if it is confined to 10 per cent or more. I do not see how it can be over 10 that you have to furnish.

Mr. Rynder: I do not think it is relevant.

Mr. Smith: I do not see how it could possibly be over 10.

Mr. Rynder: Mr. Examiner, would you mind suggesting to me the relevancy of that request?

Exam. Carter: Well, the Commission would be very much interested in knowing, for instance, if a large owner of stock yards company stock owned stock of Swift & Company, any substantial portion of Swift & Company stock.

Mr. Smith: It certainly goes to the question of whether the consent decree has been complied with in spirit as well as in letter.

Mr. Rynder: Then you have to get the owners of United Stock Yards stock.

Mr. Smith: I thought you said that would appear in this [fol. 901] prospectus you were going to have here.

Mr. Rynder: Oh, no. The prospectus only shows that they took over all of these shares of Swift & Company, so much here and so much there and so much there. It does not say who owns those shares now. United put shares on the market after approval by the Securities and Exchange Commission. We have no means of knowing who owns United Stock Yards Company shares.

Exam. Carter: I did not mean that. What I wanted was, and what I am interested in is the ownership of the stock of Swift & Company. I was going to add to that——

Mr. Rynder: Mr. Examiner, I would like to say that I cannot for a moment conceive that the ownership of stock in this or any other stock yards can have anything to do with the legal question we have involved here. If we own 100 per cent of the stock of the Chicago stock yards, perhaps you would not have this question; but I mean, if we owned 49 or 38 or any other percentage that was less than control, I cannot imagine what relevancy that would have as to whether or not we are entitled to egress without charge other than the line haul rate. I am willing to satisfy the Examiner's request upon any reasonable ground, and I will see if I cannot get that for you tomorrow. Let me get what it is. I am afraid it is not going to show what you want.

Exam. Carter: It is the names of the owners of 10 per cent or more of Swift & Company's stock. In other words, if there are 10 people or 10 corporations, or whatever it [fol. 902] may be, that each own 10 per cent of the stock——

Mr. Rynder: You want the amount each one holds?

Exam. Carter: The percentage of the total; I do not care whether you give the number of shares.

Mr. Rynder: Some of these gentlemen are very squeamish about having their private ownerships shown. It would be much easier for me to give the names of the people who own over 10 per cent. If I can get that permission, I think it would be much easier to give the names of the people who own over 10 per cent.

Exam. Carter: That will do as a starter. I am not making this as a demand, Mr. Rynder, on behalf of the Commission, but if you gentlemen care to furnish that data at our request we would be glad to have it. I want to add to that that I intended to make the same request of the representative of Armour & Company. I notice that Armour & Company's representative is not present.

Mr. Rynder: May we take a short recess?

Exam. Carter: We will take a short recess.

(A short recess was taken.)

Exam. Carter: Have you a statement you want to make, Mr. Rynder?

Mr. Rynder: Yes. I am able to answer your last question now. I have communicated with our president's office and I am advised it is their belief, in the absence of any proof, [fol. 903] or rather, any action for which this information would be relevant—they believe until something comes up where that information can properly be called for, it is improper to furnish it. There are a number of reasons for that. There is the financial standing of the men, the danger of personal attack on them, the kidnapping of their children and other matters of that kind. I am afraid—in fact, I know I will not be able to comply with your request.

Exam. Carter: Have you any further testimony?

Mr. Rynder: What?

Exam. Carter: Have you any further testimony?

Mr. Rynder: No, sir.

Exam. Carter: Have defendants any testimony?

Mr. Smith: Before we proceed, I would like to ask Mr. Tally one more question.

Exam. Carter: Take the stand again, Mr. Tally.

GEORGE F. TALLY, recalled, having been previously sworn, testified further as follows:

Cross-examination. (Cont'd)

By Mr. Smith:

Q. Did Swift acquire interest in certain stock yards following the time when this list was made up by Mr. Chaplin and submitted to the Federal Trade Commission?

A. I do not know anything about it. You mean, financial interest?

[fol. 904] Q. Yes.

A. No, sir. I do not know.

Q. You just do not know?

A. No, sir.

Mr. Smith: That is all.

Exam. Carter: You may be excused.

(Witness excused.)

Mr. Smith: Mr. Rynder, I find that one of these three companies in which Mr. Chaplin testified Swift & Company now owns stock is not shown on the list which he furnished to the Federal Trade Commission.

Mr. Rynder: Which one?

Mr. Smith: I do not like to inconvenience Mr. Chaplin by calling him back again. You can explain that.

Mr. Rynder: What one is that?

Mr. Smith: That is the Newark stock yards of Newark, New Jersey.

Mr. Rynder: Well, I think that a stock yards was developed after that time and I doubt if it is really properly classified as a public stock yards.

Mr. Smith: These are not public stock yards shown on page 24, Mr. Rynder.

Mr. Rynder: I think nearly all of them are now.

Mr. Smith: Of course, they were not at that time.

Mr. Rynder: Well, the Packers and Stock Yards Act was [fol. 905] passed since that time.

Mr. Smith: Exactly.

Mr. Rynder: What I am saying is, I think the Newark stock yards was developed since the date of that report, and that although it is so classified by the secretary, it hardly does a public stock yards business. I think it is a stock yards they had to build out adjacent to our plant, and it was called a public stock yards by the secretary, but no public stock yards business grew up there and the commission men did not come there and it is not doing the business of a public stock yards, although it is probably so posted.

Mr. Smith: Well, to avoid calling Mr. Chaplin back, could we agree on what other yards there are that are in the same category as this one at Newark, the Newark yards we have been discussing, that were developed after this report?

Mr. Rynder: You mean, if there are any others there you want to ask about?

Mr. Smith: I just do not know the names of the others. I happened to catch this——

Mr. Rynder: Let me look at that. The Bourbon stock yards I am sure has been posted as a public stock yards. Brighton stock yards——

Mr. Smith: Mr. Rynder, I am rather afraid I did not make myself clear to you. I am not interested in the information you are giving me now.

[fol. 906] Mr. Rynder: Oh.

Mr. Smith: I find that the Newark stock yards, which is one of which Swift owns the stock, according to Mr. Chaplin, is not shown on this list that he prepared for the Federal

Trade Commission. Your explanation is that that yard was developed subsequent to the time this list was made up. I asked you whether you could advise us in the interest of not calling Mr. Chaplin back, what other yards there are in which Swift acquired an interest, which were developed subsequent to this statement being made up for the Federal Trade Commission, and are not those shown on that statement?

Mr. Rynder: Here is another way around it: there are only three in which any interest, so called, is left, although the stock is in the hands of the trustee. One is the St. Joseph yards, one is Jersey City, and one is Newark.

Mr. Smith: I mean, confining it to those in which you now own stock. I am talking about any yards in which you acquired an interest subsequent to the time this statement was made up, and thus is not shown on this statement?

Mr. Rynder: Let us see the statement.

Mr. Smith: Mr. Examiner, I am going to examine these trust indentures. I think I can get what I want from them. I will withdraw that question.

Exam. Carter: Very well. The question is withdrawn.

Mr. Smith: Shall I proceed?

[fol. 907] Exam. Carter: You may proceed.

Mr. Smith: I will call Mr. Sperry.

Exam. Carter: You have already been sworn, Mr. Sperry.

Mr. Sperry: Yes.

R. A. Sperry, recalled, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Smith:

Q. State your full name again for the record, Mr. Sperry.

A. R. A. Sperry.

Q. You have previously been sworn and testified in this proceeding?

A. Yes, sir.

Mr. Smith: Mr. Examiner, I think I might state for your information the purpose in calling this witness before I begin to interrogate him. Swift & Company offered a witness here who submitted a bill of lading or a livestock contract in which stock was consigned simply to Chicago and

not to the Union Stock Yards. I found I could not get much information on that subject during the hearing for reasons that were stated in the record. I did get two or three contracts that happened to be in the Chicago area and they showed that Swift's stock covered by those bills were consigned to the particular stock yards. In view of that, Mr. Rynder and I stipulated the record not being complete on [fol. 908] that subject, it appeared that some were billed one way and some another. Since then I have been able to get some information which throws some additional light on the subject as a result of a study which has been made, and another study that is not yet complete. I will develop what that situation is.

Exam. Carter: Very well. Go ahead.

By Mr. Smith:

Q. Mr. Sperry, following the last hearing did I request you to take exhibit—I think No. 32—which shows the Swift shipments, and have the original livestock contracts examined to see how those shipments were billed?

A. You did.

Q. What is the fact as to where the livestock contracts which show that information are lodged in the records of the railroads?

A. Invariably, in the records of the originating carrier, and as to those carriers, quite frequently in the office of the local agent.

Q. As a result, in response to my request did you take the matter up with the protestant railroads—or rather, I should say, the defendant railroads, requesting them to make a study of the livestock contracts covering the shipments included in exhibit No. 32?

A. I did.

Q. Has that study been completed?

A. It has not.

[fol. 909] Q. Why has it not been completed?

A. Well, because in many instances these shipments originated on lines other than the lines reaching Chicago, and therefore it has been necessary for the carriers defendant in these proceedings to communicate with these other carriers in many cases situated at points remote from Chicago.

Q. In turn has it been necessary for the carriers to communicate with their agents on the line?

A. It has, yes.

Q. Have you received a number of reports with respect to those shipments?

A. I have.

Q. Approximately how many shipments—let me change that. On approximately how many shipments have you had reports?

A. Approximately 1,600.

Q. Those were shipments covered by exhibit No. 32, were they?

A. They were.

Q. What percentage and what number of that approximately 1,600 of those shipments were on the one hand consigned simply to "Chicago, Illinois", or "Swift & Company, Chicago, Illinois", and on the other hand to "Swift & Company, Union Stock Yards, Chicago, Illinois."

Mr. Rynder: I object to that for the very reason counsel for defendants objected to some evidence that Mr. Chaplin gave. The best evidence of that is the freight bills, or waybills. Everything else is hearsay, having passed through [fol. 910] two or three hands.

Mr. Smith: Of course, the waybills do not show it at all, Mr. Rynder.

Mr. Rynder: Well, the shipping contract does.

By Exam. Carter:

Q. Where does this information appear, Mr. Sperry?

A. Following receipt of the request from Mr. Smith, I as chairman of the Illinois Freight Association addressed a communication to the traffic vice-presidents of the Chicago district line haul carriers defendants in this case. I transmitted to those officers either a copy of exhibit No. 32 or the pages of that exhibit that referred to the shipments brought into Chicago by the railroads.

Mr. Smith: I think the Examiner wanted to know in what documents the information appears.

The Witness: I thought he wanted to know where I got my information.

Exam. Carter: Since you have started, let us get the whole story.

The Witness: We asked those carriers to cause an investigation to be made and to cause the livestock contracts to be reviewed and asked them to return those exhibits or pages of the exhibit with the letter "U" inserted in colored

pencil as to all shipments that were consigned by representatives of Swift & Company to Chicago, care of the [fol. 911] Union Stock Yards, Chicago Union Stock Yards, or Union Stock Yards, Chicago; and to indicate by a similar letter "C" in blue pencil those shipments which were consigned by the representatives of Swift & Company to Chicago with no reference to the stock yards. Those exhibits were returned marked as I had requested and from those markings I have prepared a tabulation which I have here.

Exam. Carter: Just a moment.

By Exam. Carter:

Q. Where would those people to whom you sent this communication get that information?

A. I imagine, in the first instance, being traffic people, they would pass the request to their accounting departments. Where the shipments originated on the line bringing the shipments into Chicago, the accounting officers would either review the livestock contract in their possession, or communicate with the local agent.

Mr. Rynder: All that you are now stating is what you suppose they did. You yourself did not go out and look at them.

The Witness: No, but I was told by several of those roads that that would be the procedure.

Exam. Carter: I will receive it subject to your objection. You may note an exception to my ruling. I am a little doubtful about it myself.

Mr. Smith: If this were something I had here in Chicago or that we could develop, I would not have any objection to [fol. 912] bringing it here. As a matter of fact, it can be brought here if it is a vital thing to be brought in. Of course, these livestock contracts as the witness has testified, are lodged all over this country at these local stations. Testimony of this kind is offered every day in rate cases; where they are being defended by joint agents they get this information. It is the only way it can be done. I never heard of any thing else being done.

Mr. Rynder: I wish you would not receive it subject to my objection. It is perfectly evident that is being done all over the United States. It is perfectly evident it has been done by clerks. It is perfectly evident that possibly

a certain showing was intended to be made. When one man can put up this showing, I just cannot meet it. I cannot. No matter how many errors, no matter if there were intentional errors in there, it really, in spite of the objection and exception, becomes an accepted fact in the case, Mr. Examiner.

Exam. Carter: Let me ask you this question, Mr. Rynder: would you not have the same records from which that computation would have been made as the carriers would have in which that information would appear?

Mr. Smith: I would like to ask Mr. Sperry this question.

By Mr. Smith:

Q. Mr. Sperry, does the consignee get a duplicate original?

Exam. Carter: Is this on the record, Mr. Smith?

[fol. 913] Mr. Smith: Yes.

By Mr. Smith:

Q. Does the consignee get a duplicate original of these livestock contracts?

A. I do not know, really.

Mr. Rynder: I think that we stipulated that they came in both ways. That is undoubtedly true.

Mr. Smith: The reason I am offering this testimony, Mr. Examiner, is I am not willing to stand on that stipulation alone. Swift & Company first offered a single livestock contract showing this billing simply to Chicago, and I think they testified—it is my recollection the witness testified that that is the way they had ordered their stuff billed, and that is the way it was billed. It just happens that we could find two or three more in the Chicago area, and we found they were billed to the Union Stock Yards. Now, we have found that an overwhelming number of them are billed to the Union Stock Yards, rather than to Swift. I want that in this record. These people I am advised now have a duplicate original of every one of these livestock contracts; or at least, they have received it when the shipment was made. It may be that where the stuff was not shipped by their agent, the livestock contract would go to the producer, but I do not know that any of their stuff is billed that way. I assume all of their direct stuff is billed by an employee of

Swift, and they would get this contract. So, they are in a position to check all of this and do it right in their own rec-
[fol. 914] ords, whereas to get this information we had to send all over the country. I am perfectly willing and glad to have it checked in any way it can be checked.

Exam. Carter: Are these shipments identified anywhere on any exhibit?

Mr. Smith: Yes.

Exam. Carter: They are identified on exhibit 32, are they?

Mr. Smith: All of these shipments are on exhibit 32. There is something like 3,000 of them there, and we have gotten a report thus far on only about 1,600. Those 1,600 are not identified in what Mr. Sperry has here, but they are identifiable because these exhibits came back to him with the particular shipments marked as having been billed one way or the other.

Exam. Carter: So Mr. Sperry could show what Swift & Company shipments were included in the 1,600?

Mr. Smith: Yes.

Exam. Carter: I see.

Mr. Smith: I would like to have the opportunity to examine Swift & Company's livestock contracts right here in their Chicago office and make a joint check with them on it and get every car. I am just testing the good faith of this objection. If an objection is proper to this, then let them join with us in a joint check of their own records to see what they show.

Exam. Carter: Now, Mr. Smith, I believe you had asked a
[fol. 915] question to which an objection was made, which was followed by this discussion.

Mr. Smith: That is correct.

Exam. Carter: Mr. Reporter, go back and read Mr. Smith's last question.

(Question read.)

Mr. Rynder: Well, let me say this: in the first place, there is no burden on me in this. I have proved here that the Chicago rate applies to the Union Stock Yards without any exception whatsoever, so we are entitled to whatever we are claiming, whether it has to go to the Union Stock Yards or not. I base no part of our case on that. Mr. Smith came to me to try to get the bill of lading——

Mr. Smith: You offered a bill of lading here. That is what brought the whole thing up.

Mr. Rynder: I agreed with him afterwards that they came in both ways. I do not see how this decision would be split, so that whichever way the decision goes, a shipment billed to Chicago would not be entitled to the relief we seek.

Mr. Smith: You offered an exhibit; you brought up this point, Mr. Rynder.

Exam. Carter: I will adhere to my ruling, but if you gentlemen desire to make a joint check of these shipments to determine the accuracy of this check Mr. Sperry is testifying to, that may be done.

[fol. 916] Mr. Rynder: Let me put a witness on the stand to testify without bringing in his original bills either, as to what check he has made, and I anticipate I will meet that objection right there.

Exam. Carter: I will do that, if you offer the defendants the same opportunity to check that has been made to you.

Mr. Smith: I will join in a joint check of your own records.

Exam. Carter: You offered certain testimony first by a witness and then you made a stipulation. Now, defendants in checking up on that stipulation have stated they have made an investigation and have found a certain situation to exist. They have offered to make a joint check with you as to the accuracy of that information.

Mr. Rynder: I think that would be the time for it to go in.

Exam. Carter: You want to know if you can offer a witness who will offer the results of his own check, and that will be satisfactory if you will allow defendants to make a joint check of his testimony. In other words, if you gentlemen could join together and make a joint check together it would avoid a so-called duplicate check.

Mr. Smith: Mr. Examiner, I do not understand this business about calling a witness. I want to see this case disposed of with reasonable expedition and not dragged out [fol. 917] just for fun. We are willing to join with Mr. Rynder in going over his own records to see what they show, as to these duplicate original livestock contracts. When that is done, unless we discover something of which I cannot now conceive we would discover with reference to some of these bills, I do not see why we cannot reach an under-

standing and put it in the record. I either ask the Examiner to adhere to his ruling and permit this testimony to be given; or in lieu thereof, give us the understanding we are going to make a joint check and have an opportunity to look at these duplicate original bills. We can very soon see whether they are running as these are running, because we know which ones these are. I will do it over there.

Mr. Rynder: Just a moment, please. Mr. Examiner, I am advised that to make a joint check of this thing would require for us to go throughout the United States of America by some such form as the railroads have; that the original livestock contract usually stays at the place where it is shipped, so it is not something we have here in Chicago.

Exam. Carter: Could you agree on some joint letter of some kind to go out?

Mr. Smith: I would want to see the statements if we were going to take their statements rather than the originals. Mr. Examiner, I propose that the Examiner adhere to his ruling and permit this to go in subject to objection upon the understanding that Mr. Rynder can submit within 25 days any check he has made, or the results of any check [fol. 918] he has made of his records.

Mr. Rynder: I think it is totally immaterial. I assume the Examiner is going to overrule me. I will do nothing more at this time than to note an objection after I am overruled,—or rather, I will note my objection and after the objection is overruled I will ask for an exception.

Exam. Carter: The record will show your exception, Mr. Rynder. You may proceed.

Mr. Smith: Mr. Examiner, if counsel has no objection to stating it, I would like to know whether he is going to make this check, because these carriers have yet to turn up approximately half of these shipments and if Mr. Rynder wants to make a complete record here and proposes to submit one, I am going to have Mr. Sperry continue and get all of these shipments. In that event, I want an opportunity within 25 days to furnish the result of a complete study. I will develop by Mr. Sperry that there was no picking and choosing here. I am offering this on the theory that more than 50 per cent is represented here. However, if there is going to be any study made that will cover 100 per cent of the bills, I want to have this study completed also.

Exam. Carter: I understood that Mr. Rynder did not intend to make a study. Is that correct, Mr. Rynder, or am I wrong about that?

Mr. Rynder: I doubt if this case would be worth it in [fol. 919] dollars and cents, considering the amount of labor involving in sending out and getting this information. I am sure it would be met by the objection it was inadmissible when I got it in here.

Mr. Smith: Mr. Sperry, I will ask you to——

Exam. Carter: Let me ask this:——

Mr. Smith: Excuse me.

Exam. Carter: Do you want the right to make this check and submit the information within 25 days?

Mr. Rynder: Provided it is accepted as Mr. Sperry is putting it in here.

Exam. Carter: I would make the same ruling with respect to yours as I made with respect to defendants.

Mr. Rynder: I cannot guarantee to have every movement in here from 145 shipping points.

Exam. Carter: Then do I understand you are going to make such a check and that you will furnish the information within 25 days?

Mr. Rynder: Yes.

Exam. Carter: Then, Mr. Smith, I will grant your request that you be permitted to complete your check and furnish your information within the same period.

Mr. Smith: Thank you.

Exam. Carter: Have you any further questions of Mr. Sperry?

Mr. Smith: That is all of Mr. Sperry.

[fol. 920] Exam. Carter: That will be furnished within 25 days, by the way, Mr. Smith.

Mr. Smith: I so understand.

Exam. Carter: Is there any cross examination of Mr. Sperry?

Mr. Rynder: No.

Exam. Carter: You are excused.

(Witness excused.)

Mr. Smith: Mr. Examiner, I have here Union Stock Yard and Transit Company tariff No. 11 filed with the Secretary of Agriculture, to supersede tariff No. 10 about which there was a good deal of discussion at the earlier hearing. To refresh the Examiner's recollection, I should say that the

so-called three dollar charge that was set forth in section 12 of the preceding tariff—or rather, that the tariff which embodied that section has now been supplanted by the one I have in my hand, No. 11. I ask you, Mr. Rynder, whether you will stipulate with me that this is the presently effective tariff of the Union Stock Yard and Transit Company filed with the Secretary of Agriculture to supersede the one which you offered at the earlier hearing?

Mr. Rynder: Mr. Examiner, I have no time to verify it with the original. It appears very evident that it is what it purports to be. Upon that ground I am not objecting to its introduction.

Mr. Smith: Then I will call Mr. Tally back to the stand.

[fol. 921] You are familiar with it, are you not, Mr. Tally?

Mr. Tally: Yes.

Mr. Smith: Take the stand again, please.

GEORGE F. TALLY recalled, having been previously sworn, testified further as follows:

By Mr. Smith:

Q. Mr. Tally, is my recollection correct that when you were previously on the stand at an earlier hearing, you offered as an exhibit Union Stock Yard and Transit Company tariff No. 10 which was then in effect?

A. I believe that is true, yes, sir. I do not recall if that is the exact number of it.

Q. I hand you exhibit No. 3, Mr. Tally.

A. Yes.

Q. I will ask you if that is the tariff, or a copy of the tariff which you then offered.

Mr. Rynder: Mr. Examiner, there is no objection on my part to the introduction of that tariff. I thought I made that plain.

Mr. Smith: I did not ask you whether you had an objection. I asked you whether you would stipulate with me that this was the current existing tariff, the current existing effective tariff, and that the tariff you put into the case as exhibit No. 3 has been superseded thereby.

Mr. Rynder: I imagine if you offered the present tariff I would have no objection. It is in there as the present tariff.

[fol. 922] Mr. Smith: Do you agree that it is?

Mr. Rynder: I simply say, I am not going to object. I do not have time to read that. I have never seen the original tariff, but I am assuming it bears the date which I know is the date. It looks like their tariff, so I am not objecting. It seems to me that gets it in.

Exam. Carter: It seems to me that the parties have to prove their cases, and unless you stipulate on certain matters, you may proceed in the regular way.

The Witness: I believe that is the tariff.

By Mr. Smith:

Q. That tariff has been withdrawn by the yards company, has it not, Mr. Tally?

A. Yes. It was cancelled by a tariff subsequently gone into effect.

Mr. Smith: I will ask to have this document identified as exhibit No.—what is the next number please, Mr. Examiner?

Exam. Carter: The next exhibit number will be 67.

(Defendants' Exhibit No. 67, marked for identification.)

By Mr. Smith:

Q. I hand you, Mr. Tally, what has been identified as Defendants' Exhibit No. 67?

A. Yes.

Q. I will ask you if that is the currently effective tariff of the Union Stock Yard and Transit Company filed with the Secretary of Agriculture, which has superseded and cancelled the tariff which was your exhibit No. 3.

[fol. 923] A. I do not know whether it is the tariff filed with the Secretary of Agriculture, but it is a copy of a tariff which I understand has supplanted tariff No. 10, and I assume this is a copy of such tariff.

Q. You are the traffic manager of Swift & Company?

A. No. I am assistant to the traffic manager.

Q. Assistant to the traffic manager.

A. Yes.

Q. Swift & Company pays rates assessed under tariffs filed with the Secretary of Agriculture, does it not?

A. Yes.

Mr. Rynder: I beg your pardon. I will ask Mr. Tally not to jump too fast.

By Mr. Rynder:

Q. Do you pay any of those yardage charges in there?

A. We do not pay any yardage charges of the Stock Yards Company.

Mr. Smith: You do not?

By Mr. Smith:

Q. Aren't you getting any directs at the yards?

A. If we do, there are very, very few. The answer would be "No".

Q. "No" what?

A. We do not get any directs through the Union Stock Yard and Transit Company.

Q. You are not getting any at the present time?

A. I would not say "not any". There may be one or two [fol. 924] come in. I would not want to be technically incorrect.

Q. If you are getting any, you are paying yardage charges on them under the tariff filed with the Secretary of Agriculture, are you not?

A. Yes.

Q. You have not made any check to determine whether or not a tariff has been filed with the secretary which lawfully imposes charges on those animals, is that correct?

A. Not to that extent, no. I know there has been a tariff charge, but I do not know whether it has been filed with the Secretary of Agriculture. I did not check it that far.

Mr. Smith: Mr. Examiner, I ask permission to file a certified copy of the tariff which has been identified as exhibit No. 67 within 10 days.

Mr. Rynder: Mr. Examiner, he does not have to file a certified copy. He has offered it as the present tariff. I said in advance I would offer no objection. If that does not get it in the record, I do not know what does.

Mr. Smith: If you stipulate that, it ends it. If you will not stipulate it is, I am going to be sure that tariff is in here.

Mr. Rynder: You do not need to get a certified copy for my account.

Exam. Carter: Are there any other questions of this witness?

[fol. 925] Mr. Rynder: As to my knowing whether they went through with the formality of filing it with the secretary, and so forth, I do not know; but I assume that it is the tariff, and that it has been filed, so I do not object to the introduction of the document, with Mr. Smith's statement that this is the present tariff.

Mr. Smith: Perhaps we can put it this way: you do not object to the acceptance as part of this record of the exhibit which has been marked for identification as No. 67 as being the currently effective tariff of the Union Stock Yard and Transit Company superseding their earlier tariff which is exhibit 3 in this case as filed with the Secretary of Agriculture?

Mr. Rynder: No. If I get it right, you want me to say I do not object.

Mr. Smith: All right.

Mr. Rynder: If that is the correct answer to make.

Mr. Smith: Then I will not go to the bother of getting it certified.

Exam. Carter: Is that all of Mr. Tally?

Mr. Smith: That is all.

Mr. Rynder: I have no questions.

Exam. Carter: You are excused.

(Witness excused.)

Mr. Smith: Is Exhibit 67 received in evidence, Mr. Examiner?

[fol. 926] Exam. Carter: Yes. It will be received.

(Defendants' Exhibit No. 67 received in evidence.)

Mr. Smith: I will ask that this document be identified as Defendants' Exhibit No. 68.

(Defendants' Exhibit No. 68 marked for identification.)

Mr. Smith: Now, if the Examiner please, the complainants offered a number of tariffs at an earlier hearing and defendants objected to them on various grounds. The Examiner later permitted the defendants to offer testimony with reference to the tariff situation at other points without waiving the objection to their relevancy. Subject to that reservation we now offer what has been identified as exhibit No. 68, and also what I will ask the reporter to mark as exhibit No. 69.

(Defendants' Exhibit No. 69 marked for identification.)

Mr. Smith: Exhibits 68 and 69 are, respectively, certified copies of schedule No. 3 of the Newark stockyards, Newark, New Jersey, and supplements Nos. 1, 2 and 6 thereof; and a certified copy—this is exhibit No. 69—of the currently effective tariff of the St. Joseph Stock Yards Company, filed with the Secretary of Agriculture. These are yards concerning which witness Chaplin testified this morning.

Mr. Rynder: By the way, I have received no copies of any of these recent exhibits.

Exam. Carter: You mean, 67, 68 and 69?

Mr. Rynder: Yes.

[fol. 927] Mr. Smith: With reference to 68 and 69, I have no copies of these. I will undertake to secure copies of them and supply them to Mr. Rynder. I think he has them in a set of exhibits his associate has here and had in the court room at the earlier hearing.

Mr. Rynder: Perhaps if you identify them specifically by date and number I will not need copies of them. I also have not been presented with a copy of this new stock yards tariff.

Mr. Smith: I can take care of that right now.

Mr. Rynder: All right.

Mr. Smith: I now hand you a copy of exhibit 67.

Mr. Rynder: Thank you.

Mr. Smith: The St. Joseph stock yards tariff I referred to is entitled "St. J. S. Y. Co. No. 10 (Cancels No. 9 and all Supplements Thereto The St. Joseph Stock Yards Co. Schedule of Charges for Feed and Service Including the Privilege of the Market Also Rules and Regulations", effective April 20th, 1938. That is exhibit 69.

Mr. Rynder: All right.

Mr. Smith: The Newark Stock Yards tariff to which I have referred, which was submitted as exhibit No. 68, is captioned "Newark Stock Yards Kearny, New Jersey Schedule of Charges For Feed and Service Also Rules and Regulations", which was issued April 20th, 1932, effective April 30th, 1932. I offer those as the currently effective [fol. 928] tariffs. May they be received in evidence, Mr. Examiner?

Exam. Carter: They will be received in evidence.

(Defendants' Exhibits Nos. 68 and 69 received in evidence.)

Mr. Smith: Do you want copies of those, Mr. Rynder?

Mr. Rynder: No.

Mr. Smith: Mr. Examiner, it was testified this morning that during a certain period of several years the complainant, Swift & Company, and the other packers, due to some attack that was made by them on the consent decree, during that period regained complete control of the yards of which they owned stock, or in which they had stock interest.

Mr. Rynder: That is not quite correct, to say that we regained control of the yards. As to Mr. Chaplin's testimony, Mr. Smith will find that we regained control of the stock. I am not sure there was one of them at the time in which we had 50 per cent ownership.

Mr. Smith: I am not attempting to quote the record in that regard. I was simply bringing it back to the Examiner's mind for what it does actually show,—I mean, the testimony of Mr. Chaplin. What I respectfully ask is that within 15 days, in view of that testimony, defendants be permitted to obtain certified copies of various tariffs covering the rates and charges filed with the Secretary of Agriculture during that period, of certain of the yards shown on this table which Mr. Chaplin said he prepared for the [fol. 929] Federal Trade Commission. There are some of those tariffs which have already been filed by Swift & Company. Mr. Tally has testified about one or two of them. I ask for permission within the time I have indicated to file tariffs for some of the other yards as soon as I can obtain them from the Secretary of Agriculture.

Exam. Carter: That permission will be granted.

Mr. Smith: I beg your pardon?

Exam. Carter: That permission will be granted.

Mr. Smith: May we be off the record?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: You had better put this on the record.

Mr. Rynder: May I inquire the purpose of that last offer you made, Mr. Smith?

Exam. Carter: Mr. Rynder wants to know the purpose, Mr. Smith.

Mr. Smith: Yes. The purpose of that offer—I am very glad to advise Mr. Rynder—is to show that at many yards these packers who are insisting that railroad transportation continues after the stock is unloaded in the unloading pens, established yardage charges on direct shipments to

packers and assessed those yardage charges on direct shipments, and filed those tariffs with the Secretary of Agriculture, a position which I here contend is inconsistent with the position they take here.

Mr. Rynder: What points are those?

[fol. 930] Mr. Smith: I did not name the points. There are other stock yards shown on this list.

Mr. Rynder: Mr. Examiner, I find myself asking for another hearing—or I will, very soon—because first, these packers never filed those tariffs. I do not know of one of the points involved where, except at one or two small places where they had to build stock yards in front of a packing plant, we are even a 50 per cent owner; but if that is to be taken as an acquiescence by these packers in the situation existing at Chicago, I would have to show by oral evidence that those charges were avoided at many places in much the same way we have been able recently to avoid them at Chicago.

Mr. Smith: You say "in much the same way". You are talking about avoiding a tariff legally filed with the Secretary of Agriculture?

Mr. Rynder: Yes.

Mr. Smith: How do you mean, to avoid it?

Mr. Rynder: If a tariff says I have to pay $5.50 for a lower berth, I can avoid it by taking a day coach.

Exam. Carter: Are you making an objection to that offer?

Mr. Rynder: I want a further hearing after they are in. Many of those situations are well known. At Kansas City, right next door——

Exam. Carter: Are you able to identify the points now for which you desire to file those tariffs?

[fol. 931] Mr. Smith: Well, I think I can. It might be worth mentioning that counsel for Swift & Company have already filed several of these tariffs themselves. I want to undertake to procure and file under the authority given me the tariff of the Portland Union Stock Yards Company of North Portland, Oregon; the tariff of the Oklahoma National Stock Yards Company at Oklahoma City, Oklahoma; the tariff of the New York Stock Yards Company at New York, New York; the tariff of the Milwaukee Stock Yards at Milwaukee, Wisconsin; the tariff of the Kansas City Stock Yards at Kansas City, Missouri; the tariff of the Interstate Stock Yards Company, Jacksonville, Florida; the tariff of the Fort Worth Stock Yards at Fort Worth, Texas; the

tariff of the El Paso Union Stock Yards Company at El Paso, Texas; the tariff of the Dallas Union Stock Yards Company at Dallas, Texas.

Mr. Rynder: That is dead, by the way.

Mr. Smith: (Continuing) The tariff of the Denver Union Stock Yards Company at Denver, Colorado; the Crescent City Stock Yards—just a moment; I do not find it on the list of public stock yards as submitted to me by Swift & Company. I will pass that. The tariff of the Central Stock Yards Company at Jersey City, New Jersey; the tariff of the Brighton Stock Yards at Brighton, Massachusetts. That will about complete the list. Swift offered the others.

Exam. Carter: What about your request for further hearing, Mr. Rynder?

[fol. 932] Mr. Rynder: If that is to be evidence against Swift & Company, I want another hearing. That is what I was afraid of this morning.

Mr. Smith: Mr. Examiner, we object to any further hearing being held. We are here in Chicago where the headquarters of Swift & Company is located. They have their offices here. They know what is going to be offered. There are certified copies of these tariffs filed with the Secretary of Agriculture. They can put in any evidence with reference to them that they want.

Exam. Carter: I will give you an opportunity to put in any evidence you want this week with respect to this testimony to be offered.

Mr. Rynder: It is not proper procedure to put in the evidence concerning the yards without having in first the tariffs.

Exam. Carter: Have you those tariffs in your file, Mr. Tally?

Mr. Tally: I do not know whether we have them or not, Mr. Examiner. We have some of them, probably.

Mr. Smith: I was told before that you had all the tariffs of the yards that filed tariffs, and that your file was as complete as you can make it. Is that right?

Mr. Talley: As complete as we can make it, yes.

Exam. Carter: Mr. Smith, when will you be able to get these tariffs, do you think?

[fol. 933] Mr. Smith: Oh, I think it would take a week or ten days. I got a couple of these tariffs this morning through the mail and counsel in Washington through whom

got them said that the secretary had a rule now under which they want a request made in writing; they want to know for what purpose they are going to be used. Therefore, I will have to make formal request for them.

Mr. Rynder: Mr. Examiner, this is the trouble with coming along with a case this way and offering this, what I consider to be, new evidence just at the end of the hearing. You say the Swift general offices are in Chicago, but——

Exam. Carter: Gentlemen, on this question, we are discussing now—excuse me, Mr. Rynder. Go ahead.

Mr. Rynder: If I put Mr. Tally on the stand to tell what he understands to be the facts about the Central Union Stock Yards Company of New Jersey,—you can leave this off the record, if you want to. Do you want it on the record or off the record?

Exam. Carter: Do you want it on the record or off the record?

Mr. Rynder: Well, I am just trying to explain to you my difficulties. I do not want it to be said I am trying to testify. I would rather have it off the record.

Exam. Carter: Off the record, Mr. Reporter.

(Discussion outside the record.)

Exam. Carter: Suppose you proceed, Mr. Smith.

[fol. 934] Mr. Smith: With reference to exhibits 33 and 34, I think I had sufficient copies for the record, but I did not have a copy for the Examiner and I think I did not have a copy for counsel. I now supply copies for the Examiner and for counsel.

Exam. Carter: Very well. The record will so show.

Mr. Smith: Mr. Rynder referred this morning to some statement made by Francis J. Heney at a congressional investigation at which Mr. Swift testified. I understood him to say when I objected to it on the ground it was not in evidence, he was going to offer it. Do you propose to offer it, Mr. Rynder?

Mr. Rynder: I do not recall what I said about it.

Mr. Smith: You said that Mr. Heney admitted during that congressional hearing that Swift & Company did not get any stock of the Maine company, and I objected to it on the ground it was not in evidence,—I could easily be wrong about this—but, I understood you to say it would be in evidence later. Are you going to offer that?

Mr. Rynder: No. I think I can find the spot for you in this record where he said it, although it is totally immaterial whether Mr. Swift got any of that stock or not.

Mr. Smith: I offer as an exhibit, since it is not to be offered by Mr. Rynder, to support that statement, an excerpt from the hearings before the Committee on Agriculture and Forestry, United States Senate, Sixty-Fifth Congress, third session, on a bill then pending before Congress. [fol. 935] That part of the testimony which I offer is the testimony given by Mr. Louis F. Swift, president of Swift & Company, dated June 29, 1919. It is the testimony of Mr. Swift gave on his voluntary appearance before the Committee. I have not offered all of Mr. Swift's testimony at that time. I have no objection to his full testimony being offered.

Mr. Rynder: May I see what is being offered here?

Mr. Smith: Yes. I do not think I need to offer testimony of this character. I think it is testimony of which the Commission takes judicial notice, in as much as it is a public document, but to avoid any conceivable question about it, I make the offer.

Mr. Rynder: Has this been given an exhibit number yet?

Mr. Smith: No.

Exam. Carter: That will be identified as exhibit No. 70.

(Defendants' Exhibit No. 70 marked for identification.)

Exam. Carter: Does that complete your documents?

Mr. Smith: Except this, that I want to ask Mr. Rynder whether or not he is going to offer for the record a copy of the answer of the Union Stock Yards in this case started by Swift, of which the complaint is in the record, about 1891 or 1892. The Examiner will recall I requested that that be furnished at the last hearing, and Mr. Rynder, as I remember it, said if he found he had it, he would supply it. He does have it and I would like him to supply it.

[fol. 936] Mr. Rynder: The answer is "No". I will not supply it.

Mr. Smith: I would like to ask the Commission to request Swift & Company to furnish for the record a copy of the answer referred to.

Exam. Carter: That is in the suit of Swift & Company——

Mr. Smith: Against the Union Stock Yards Company, yes.

Exam. Carter: Will you furnish that copy, Mr. Rynder?

Mr. Rynder: No, sir.

Exam. Carter: I will transmit your request to the Commission, Mr. Smith, and the Commission will rule upon it.

Mr. Rynder: You will recall, that is in a suit that was filed in 1891, which was dismissed. He is calling on me for the answer of the Union Stock Yard and Transit Company.

Mr. Smith: Exactly; in a case your company started.

Mr. Rynder: Yes, sir.

Mr. Smith: The answer of which you have a copy.

Mr. Rynder: I do not deny that, but I deny we are here under any general investigation.

Exam. Carter: I say, I am going to transmit your request to the Commission. They will have to rule on it.

Mr. Rynder: I deny we are here under any general investigation.

Mr. Smith: Has the Examiner ruled on the admissibility of Exhibit No. 70 yet?

Exam. Carter: I have not ruled on exhibit No. 70 yet. [fol. 937] Just a moment on that. Do you know the number of that Swift case? Can you get it?

Mr. Smith: Yes, your Honor: it is No. 90859, of the Circuit Court of the state of Illinois, Swift & Company versus the Union Stock Yard and Transit Company of Chicago, No. 4418, bill filed April 20th, 1891, Henry Best, clerk, Albert H. Veeder, Campbell & Custer and Walker & Eddy, solicitors for complainant. The answer I referred to is the answer of the Union Stock Yard and Transit Company of Chicago to the petition which is exhibit No. 49 herein.

Mr. Rynder: I may say, for the information of anybody who wants to know it, the answer is identical with those that are in, but I thought this case led so far from the present issue, back into a certain line of mud slinging indulged in in the 1920's, that it is one for an investigation of that situation, rather than on the issues before the Commission.

Mr. Smith: Mr. Examiner, may I say a word there, please?

Mr. Rynder: I am not intending to offer voluntarily anything that goes in that direction.

Mr. Smith: Inasmuch as counsel has said these answers are identical—that is, that the Swift answer which I have requested is identical with the answer in the Morris case, and inasmuch as the answer in the Morris case is part of the record here, I shall withdraw my request that this

other answer be furnished. Now, I want to say a word [fol. 938] about these repeated statements about this mud slinging. I am not at all clear as to why it is slinging mud to put into this record the pleadings in a case which was started by this complainant itself. I am going to show that this testimony which is offered and which has been received, far from being any mere mud slinging, comes pretty near being decisive of this case.

Exam. Carter: Gentlemen, I think at this time we will adjourn until tomorrow morning. In the meantime, that will give Mr. Rynder an opportunity to examine exhibit No. 70, which you have offered and which has not yet been ruled upon, to determine whether he desires to offer any additional testimony. That will also give him the opportunity to determine about his request for a further hearing. After the hearing closes today, I will talk to Mr. Smith with respect to attempting to facilitate the obtaining of those tariffs. I might say, if Mr. Rynder insists upon his further hearing, I will set that further hearing for the early part of next week here in Chicago. Now, before we adjourn, Mr. Rynder, you said you would attempt to obtain a copy of the proposed report in Docket 472 before the Secretary of Agriculture. Have you been able to do that?

Mr. Rynder: I have been unable to do that, Mr. Examiner.

Exam. Carter: Mr. Tyler, did not the stock yards company have copies of that report printed?

Mr. Tyler: The tentative report?

Exam. Carter: Yes.

[fol. 939] Mr. Tyler: Of the Examiner?

Exam. Carter: Yes.

Mr. Tyler: Yes, they did.

Exam. Carter: Would you mind furnishing us a copy of that tentative report?

Mr. Tyler: I cannot tell you at this time, Mr. Examiner. I know that the officials of the stock yards company are very reluctant to have those published when they are not public records. I could not take it upon my shoulders to say whether we could do that or not. I will have to ask them.

Exam. Carter: Was it distributed by the stock yards company?

Mr. Tyler: There are copies. I know that. I have some in my office, but they do not distribute them, to my knowledge.

Exam. Carter: When you say "distribute them",—did they hand out a good many of those printed copies?

Mr. Tyler: I do not believe they did.

Exam. Carter: Do you know how many they had printed?

Mr. Tyler: I think they had 150 printed, but I know they are in the vault down there in the stock yards. Many people have asked for them, and they have declined to give them.

Exam. Carter: That is just a request.

Mr. Tyler: I shall be very glad to convey it to Mr. Leonard. I will let you know in the morning.

Exam. Carter: Very well.

[fol. 940] Mr. Smith: Before we adjourn, I would like to say that when we meet again in the morning, I shall be very happy if Mr. Rynder will advise me when I can appear at the office of Mr. Veeder to examine these documents.

Mr. Rynder: The situation, as Mr. Veeder described it to me over the phone at noon was that he was leaving for a little vacation; that Mr. Robert Fischer, one of the lawyers in his office, is quite familiar with the file, is now in Texas and would be back Wednesday, and that they would be available for you upon Mr. Fischer's return Wednesday.

Mr. Smith: Thank you.

Mr. Rynder: Mr. Examiner, I object to this merely as a matter of form, unless I am permitted to bring to your attention certain other portions of the committee report, with no more formality.

Mr. Smith: I think I said I did not have any objection to your putting anything in.

Mr. Rynder: I do not want to have to get a certified copy of a committee report of Congress 20 years old.

Exam. Carter: You mean, you want to refer to certain portions of that report and to have it stipulated that the Commission may refer to those portions of that report as part of the evidence? Is that what you want?

Mr. Rynder: Yes. I will have to call your attention to them in this volume that I have here.

[fol. 941] Exam. Carter: You may do that in the morning. There will not be any objection to that, will there?

Mr. Smith: No objection at all. He has the volume there. I should think it could be copied, in the interest of convenience of all parties and distributed as an exhibit. If he cannot do it, I will not object to the other method.

Mr. Rynder: I cannot do it here and now. However, I think the points to which I want to call your attention will be very short. There will be no more than four or five lines in each. I did want to reserve the right, as I told you this morning, to present a short argument on a motion to strike this evidence.

Exam. Carter: Very well. We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 3:55 P. M. Central Standard Time, adjourned until 9 A. M., Central Standard Time, July 19th, 1938.)

[fol. 942] Chicago, Illinois, July 19, 1938. 9 o'clock A. M., Central Standard Time.

Before: Paul O. Carter, Examiner, Interstate Commerce Commission.

Met pursuant to adjournment.

Appearances: As Heretofore noted.

Exam. Carter: Come to order please, gentlemen. Yesterday I did not rule on exhibit No. 70, which contained extracts from Mr. L. F. Swift's testimony in the congressional hearings following the Federal Trade Commission report. I will receive that in evidence with the privilege reserved to Mr. Rynder to supplement that testimony with any other testimony which he desires to offer from that particular hearing.

Mr. Rynder: That was in fact what I was intending to look for myself. If it had not been put in by Mr. Smith, I would have introduced it.

Exam. Carter: Do you desire to supplement that in any way with further testimony?

Mr. Rynder: Not at all. I think it is perfectly adequate to prove the point I desire to prove about that matter.

Exam. Carter: Exhibit No. 70 will be received in evidence.

(Defendants' Exhibit No. 70 received in evidence.)

Exam. Carter: Mr. Tyler, did you find out whether or not you will be able to furnish a copy of the proposed report [fol. 943] in Docket 472 before the Secretary of Agriculture?

Mr. Tyler: I did, Mr. Examiner, and the yards company declines to supply any copies.

Exam. Carter: I might say, the Department of Agriculture has assured me I will be able to obtain a copy of that report. My only reason for the request would be so it would be more readable. Now, with reference to the question of further hearing; have you decided on that, or would you rather defer decision on that until later in the day?

Mr. Rynder: In the view I take of it, Mr. Examiner, the evidence intended to be offered is totally irrelevant to any issue in this case, and I am so firmly convinced of that, I will not ask for a further hearing.

Exam. Carter: You are referring to the tariffs——

Mr. Rynder: I am simply referring to the tariffs Mr. Smith stated as the Portland Union Stock Yards and the following list; simply the tariffs.

Exam. Carter: Yes. Mr. Smith, had you completed your presentation?

Mr. Smith: Yes.

Exam. Carter: Have you anything further to offer, Mr. Rynder?

Mr. Rynder: Yes.

Exam. Carter: You may proceed.

Mr. Rynder: I will call Mr. Bliss.

[fol. 944] Exam. Carter: Be sworn please, Mr. Bliss.

J. H. Bliss was sworn and testified as follows:

Direct examination.

By Mr. Rynder:

Q. Please state your full name for the record, Mr. Bliss.
A. J. H. Bliss.
Q. Your residence?
A. My residence?
Q. Yes.
A. 322 North East Avenue, Oak Park, Illinois.
Q. What is your business or position?
A. Assistant treasurer of Swift & Company.
Q. How long have you been so employed?
A. Since April, 1935.
Q. What was your experience prior to that time?

A. I went with Swift in the summer of 1918.

Q. And thereafter what was it?

A. I remained there until 1922.

Q. In what capacity?

A. In the comptroller's office. From 1922 to 1935 I was comptroller of Libby, McNeill & Libby.

Q. And thereafter assistant treasurer of Swift & Company?

A. That is right.

Mr. Rynder: I think perhaps, Mr. Examiner, the first [fol. 945] thing I will call your attention to is the question that you asked yesterday about whether we would furnish the names of the individuals who own more than 10 per cent of the stock of Swift & Company. We have reconsidered that and Mr. Bliss has examined certain documents. If the Examiner desires that information, we are willing to state it.

Exam. Carter: We would like to have that information if you are willing to give it. I am not attempting to force you to give it in this proceeding.

Mr. Rynder: Very well.

By Mr. Rynder:

Q. What documents have you examined in that connection this morning, Mr. Bliss?

A. That information is available to the public in the form of an A-2 registration statement filed by Swift & Company in connection with its issues of securities with the Securities and Exchange Commission.

Q. What is the situation as to the ownership by any individual of 10 per cent or more of the stock of Swift & Company?

A. One of the direct questions asked in the registration statement is to state the names of those who hold either directly or beneficially 10 per cent or more of the shares of capital stock of Swift & Company, and the answer to that question on file is that there is no one who has 10 per cent or more of the voting stock of Swift & Company either owned directly or beneficially.

Exam. Carter: Just a moment, please.

[fol. 946] By Exam. Carter:

Q. When was that registration statement filed?

A. The first registration was filed in 1935, and a supplement in 1937, on February 28th.

Exam. Carter: Go ahead, Mr. Rynder.

By Mr. Rynder:

Q. Mr. Bliss, what would 10 per cent of the capital stock of Swift & Company amount to in total shares?

A. The total number of shares is 6,000,000. 10 per cent of that would be 600,000.

Q. Without naming any individual or giving any further details, would you state about what the highest individual ownership is, approximately.

A. Again, from the information on file in that particular report, no one of the officers or directors of the company holds as much as 1 per cent.

Q. They do not hold as much as 1 per cent?

A. No; of the shares of the capital stock of the company.

Exam. Carter: Let me ask this question—and if you do not want the witness to answer, you may stop him.

By Exam. Carter:

Q. You said no officials or directors of the company own as much as 1 per cent. Is that what you stated?

A. That is right.

Q. Are there any individuals who do own as much as 1 per cent of the stock?

A. Yes. There are certain individuals who hold 1 per [fol. 947] cent or more, but no one holds 10 per cent.

Exam. Carter: Go ahead, Mr. Rynder.

Mr. Rynder: Before asking Mr. Bliss the next few questions I intended to ask him, I want to call the Examiner's attention as the basis for those questions to certain of the provisions of the consent decree which is exhibit 62 in this case, paragraph 2 of which reads as follows: "That the defendants and each of them be, and they are hereby, jointly and severally perpetually enjoined and restrained from owning, either directly or indirectly, individually or by themselves, or through their officers, directors, agents or servants, any capital stock or other interest whatsoever in any public stock yard market company in the United States or in any stock yard terminal railroad in the United States

or in any stock yard market newspaper or stock yard market journal published in the United States" and so forth; then, continuing: "and said defendants and each of them are hereby further enjoined and restrained from accepting or permitting to be given, directly or indirectly, on any pretext whatever, to any of them, or any of their officers, directors, servants or employees, for the use and benefit of the corporation defendants or any of them; any capital stock or other interest in any public stock yard market company, stock yard terminal railroad", and so forth. I want to further call the Examiner's attention to the Swift group against which that order ran. They are: Swift & Company of Illinois. Swift & Company of West Virginia. Swift & [fol. 948] Company, Inc., of Kentucky. Swift & Company Limited, of Louisiana. Swift & Company of Maine. Swift Beef Company of Maine. United Dressed Meat Company of New York. J. J. Hartington & Company, Inc. Bimbler Company. The G. H. Hammond Company. Omaha Packing Company. Plankington Packing Company. Sturtevant & Haley Beef & Supply Company. E. K. Pond Packing Company. Van Wagenen and Schickhaus Company. Western Packing Company. Hammond Beef Company. Omaha Meat Company. A. Canfield Commission Company. H. C. Derby & Company. Metropolitan Hotel Supply Company. Vermont Supply Company. The Hotchkiss Beef Company. New England Dressed Meat & Wool Company. North Packing & Provision Company. The Sperry & Barnes Company. John P. Squire & Company of Maine. John P. Squire & Company, Inc., of Massachusetts. John P. Squire & Company, Inc., of Rhode Island. Springfield Provision Company. White, Pevey and Dexter Company. Louis F. Swift. Edward F. Swift. Charles H. Swift. Gustavus F. Swift, Jr. Harold H. Swift. Alden B. Swift. George H. Swift. Laurence A. Carton. Frank S. Hayward. Charles A. Peacock. Wilfred W. Sherman. Wellington Leavitt. John M. Chaplin, William B. Traynor. I have a few questions I would like to ask, and in these questions I will refer to that group as the Swift group.

By Mr. Rynder:

Q. Mr. Bliss, after you became assistant treasurer of Swift & Company in 1935, were the matters pertaining to [fol. 949] the ownership of the Swift group and the stocks

of public stock yards a matter put particularly under your jurisdiction and control?

A. Yes. The first undertaking that was assigned to me was a survey of the interests of that group in stock yards companies and the development of possibilities of the sale thereof.

Q. To the best of your knowledge and belief, are you fully informed as to the stock ownership in public stock yards of every person or corporation in the Swift group in the consent decree?

A. Yes.

Q. Did you have supervision of the making of reports to the court and the department of justice as to the stocks held by any of the Swift group in the consent decree?

A. I assisted in the preparation and review of the reports for the trustee which he filed.

Q. Which he filed where?

A. With the court of the District of Columbia.

Mr. Smith: May I hear that answer, please?

Exam. Carter: Read the answer.

(Answer read.)

Mr. Smith: What trustee is that, please?

The Witness: The trustee under the consent decree who holds the interests of this particular group in public stock yards, under the consent decree.

Mr. Smith: What is his name, please?

[fol. 950] Mr. Rynder: Walsh, I think.

The Witness: Walsh is the present trustee. Former postmaster New was trustee at the time. He died about two years ago, I guess it was.

By Mr. Smith:

Q. You said you prepared reports for some trustee. I want the name of that trustee for whom those reports were prepared.

A. Yes. At that time it was Mr. New.

Q. And subsequently did you prepare some for the——

A. Mr. Walsh as his successor.

Mr. Smith: All right.

By Mr. Rynder:

Q. As to any of those named in the Swift group in the consent decree, has any ownership of any kind of security

of the Union Stock Yard and Transit Company of Chicago, the United Railways and Union Stock Yards Company of New Jersey or the Union Stock Yards Company of Maine——

A. None at all.

Q. Just a moment, until I complete the question—been reported as belonging to the Swift group?

A. None at all.

Q. Have you in the daily conduct of your business ever seen any paper or document that would indicate that anybody in the Swift group had any ownership of any kind of security in any of the three companies I have named?

A. Not at all.

[fol. 951] Q. Do you believe it to be true that the reports made by you to the trustee and in turn by the trustee to the court are true and correct in that respect?

A. Yes.

Q. If there had been such ownership, is it a matter that should have been brought to your attention?

A. Naturally.

Mr. Rynder: That is all.

Mr. Smith: I have no questions.

Exam. Carter: You may be excused, Mr. Bliss.

(Witness excused.)

Exam. Carter: Have you any additional testimony, Mr. Rynder?

Mr. Rynder: I believe there is no further testimony on our part.

Exam. Carter: You have nothing further, Mr. Smith?

Mr. Smith: That is all.

Exam. Carter: Do you desire to argue the question of the admissibility of these contracts and so forth?

Mr. Smith: Yes. I would be pleased to have an opportunity.

Exam. Carter: Do you want to start now?

Mr. Rynder: I would appreciate it if you would give me a short recess so I can collect my scattered thoughts.

Exam. Carter: Very well. We will take a short recess.

(A short recess was taken.)

[fol. 952] Exam. Carter: Are you ready?

Mr. Rynder: I have one document here I did not know I would be able to obtain today. It is the prospectus of

the United Stock Yards Corporation dated April 6, 1937. I have telephoned and found that the president of the corporation is out of town. The secretary has been recently employed. The chairman of the board is also on vacation. I would like to show that to Mr. Smith, and if it may go in by stipulation I would like to file it.

Mr. Smith: Is that the one filed with the Securities and Exchange Commission?

Mr. Rynder: The date I mentioned there was wrong. The one dealing with the formation of the company and the purchase of the Swift group of stock yards stocks is dated October 22, 1936. It is my understanding that is filed with the Securities and Exchange Commission, and also was used in connection with the attempt to sell the securities of the company when it was organized.

Mr. Smith: Does it purport merely to state facts, or does it state any place in the document——

Mr. Rynder: All I want to offer it for is to show the Swift stocks that according to that prospectus were taken over.

Mr. Smith: Does it purport to state facts or does it anyplace contain the conclusion that the consent decree has been complied with?

[fol. 953] Mr. Rynder: No, it does not contain any conclusion that the consent decree has been complied with.

Mr. Smith: Let us look at it for a moment. I do not think there will be any objection.

Mr. Rynder: That simply shows we sold the stock.

Mr. Smith: This merely shows the other company purchased it and it shows exactly what was purchased?

Mr. Rynder: There may be a little advertising later in the prospectus as to what a good thing it is, and so forth. I do not offer it for that.

Mr. Smith: It will not tempt me. I will not object to it on that ground.

Mr. Rynder: I will let that go, I think, until I have presented the argument I desire to make upon a motion to strike.

Exam. Carter: Very well. You may proceed.

Mr. Rynder: I desire to say, Mr. Examiner, in commencing this short argument, that the complaint in this case, without reading you the various paragraphs, alleges that the practice under which Swift has to pay yardage in order to obtain possession of its shipments is an unreasonable

practice; that the relief sought is an order under which complainants may obtain delivery to them by defendants of said direct shipments, and so forth, to the nearest public street without the payment of yardage charges to defendants' agent, the Union Stock Yard and Transit Company, and without payment of any charges other than the lawful [fol. 954] transportation charges for the transportation of such direct shipments from the origin thereof to the Union Stock Yards at Chicago. Now, that presents an issue as I see it, that any company may properly bring here for decision upon its merits and totally independent of its ownership in these stock yards or in any other stock yards. I will ask your Honor, though, to assume for the purpose of my argument, that by the evidence here offered and the further orders that Mr. Smith will examine and of which I will file certified copies, so there can be no misconstruction, that Swift has no interest of any kind whatsoever in the property of the Union Stock Yard and Transit Company of Chicago or any of the affiliated companies which have been mentioned here, each of which I think is a holding company. Now, it must be remembered, Mr. Examiner, that there are a great many things at the present time which are prohibited or prevented by statute. They are not inherently wrong, but they are wrong only because the statute has provided that they shall not be done. I will try to take these general matters in sequence of time, and I hope to convince your Honor that they are irrelevant to any issue in this case. I am sorry that perhaps your Honor has not had time to read the documents to which I will refer, but let me first say that in substance, the contract, exhibit 47, which is a contract between the Chicago Junction Railways and Union Stock Yards Company and Philip D. Armour and others, was made apparently on January 15, 1892; and I [fol. 955] suppose the only important point in that contract is that the Chicago Junction Railways and Union Stock Yards Company agreed to issue certain income bonds to these packers, pay the interest on them and pay the principal at the time provided in the contract which was in 1907. The testimony here is that the contract was carried out; the interest was paid; and that thereafter Swift had no ownership or any security direct or indirect in the Union Stock Yard and Transit Company of Chicago, and has not had up to the present time. While I believe that counsel has no more to go on than the mere suggestion of the Federal

Trade Commission to the effect that they had been unable to trace certain bonds of the Maine Company—and that came along some years after this contract—therefore, it was merely assumed that some of the big packers had gotten some of those bonds or bearer warrants. But, the fact is that our witness yesterday testified that that is not a fact, and exhibit No. 70 offered by Mr. Smith proves that to have been a fact at the time of the congressional hearings which followed the Federal Trade Commission report. Mr. Heney, who conducted that investigation, and as we were always led to believe, prepared the report, had apparently found out what the facts were between the time of the Federal Trade Commission report and the committee hearings in congress, and since your Honor doubtless had not had a chance to read this, I would like to read some of it to you. This is all referring to the question of the Chicago Stock Yards Com-
[fol. 956] pany of Maine. I wish I could read the entire thing, but I will just read some excerpts. Mr. Examiner, it just occurs to me that as this is in the record, perhaps it would be encumbering the typewritten part if I put in all of these quotations. If you care to have it left out of the record when I read to you the quotations like this, inasmuch as they are already in the record, it is agreeable to me.

Exam. Carter: Are they very voluminous?

Mr. Rynder: On this one, yes.

Exam. Carter: They are?

Mr. Rynder: Yes.

Exam. Carter: Well, we have to have a connected story. I think the quotations should go into the record, so we can connect up your remarks with the quotations to which you are referring. I would rather have a connected story here.

Mr. Rynder: All right. I am reading from exhibit No. 70, and if I skip parts it is merely because I do not want to read the whole exhibit into the record. I want to say that all of this refers to the question of the formation of this Maine company, and where its securities went. The witness on the stand was Louis F. Swift, president of Swift & Company.

"Mr. Heney: When that was up, Swift & Co. had a representative, Swift & Co. and Armour & Co. each had a representative meet with the representative of the New Jersey Company and negotiated for several years down to 1910, from July, 1907, over what kind of an arrangement would be

[fol. 957] made, as a new inducement to Armour and Swift and Morris to remain at Chicago, is not that correct?

"Mr. Swift: That may have been, but nothing ever came of it, so far as I knew."

Then again:

"Mr. Heney: And that the New Jersey company was going to await that decision"—referring to the Pfaelzer case—"before going ahead and doing what you folks were asking for?

"Mr. Swift: They would not do anything for us, and they claimed they wanted to wait about that decision, or something.

"Mr. Heney: All right. Did not Mr. Prince tell you when that decision was pending that he had arranged a new scheme by which he was going to organize a holding company; that is, would acquire the common stock of the New Jersey company, and that they would give you stock in this company that would produce dividends about to the amount you were insisting on having?

"Mr. Swift: Mr. Prince did not take me into his confidence to that extent, Mr. Heney.

"Mr. Heney: Never told you at any time that he would give you anything by way of a subsidiary from the New Jersey corporation or from the Maine corporation, or any other way; is that what you want to be understood as saying?

"Mr. Swift: He did not give me any details about a stock or about stock in a stock company. Those names or facts [fol. 958] were not mentioned. He told me if I would keep still and not press the matter—not move our plant or not threaten to move it, keep still, I might get something after a while. But I never got anything.

"Mr. Heney: Did the fact you did not get anything at the final windup, and Armour got it all, have anything to do with that dissatisfaction? You were promised something and you did not get it, and Armour did, did he not?

"Mr. Swift: That is right. At the same time we were promised something before and we did get it. I am sorry we took it. I had rather not have had it. I would rather have moved; we would have been better off today; it would be best, a much better proposition."

Then there were some questions about some dates. Then next:

"Mr. Heney: We do not care for it. Was any representative in the operating company at the stock yards, the Transit Co., board of directors in the past three years?"

This was December of 1918.

"Mr. Swift: No, sir; Swift & Co. have no representative of that kind and never did have.

"Mr. Heney: The Junction Railroad?

"Mr. Swift: No, sir; they have not and they did not have, with the exception of what I said about Mr. Veeder, and that must have been 20 years ago.

"Mr. Heney: Now, let us go back to Mr. Prince; I am not [fol. 959] entirely satisfied on that. You say he said to keep quiet and you might get something?

"Mr. Swift: He said if I did not keep quiet I would not get anything. So I just kept quiet and did not get anything, either."

Then again:

"Mr. Heney: Now, Mr. Wadden, the treasurer of the company told me in Boston that down to the last minute of this correspondence which I am going to ask you about in a moment, he promised you—he acting for Mr. Prince—that you were to receive your share, and Morris his share, and that you were thrown down, and they did not carry out that promise when Mr. Prince got back from Europe. Is that true or false?

"Mr. Swift: I presume it is true; I think Mr. Wadden is a truthful man."

Then there are references to some correspondence which I will skip as being too lengthy to read into the record. Then again:

"Mr. Heney: Did he not tell you at that time, Mr. Swift, just what it was you were to get? And was not this it, that there were $2,085,000 of bonds of that Maine company that were going to be divided between you and Morris in the proportions in which you had been receiving with Armour under this other arrangement?

"Mr. Swift: No, sir; I do not know anything about those details. Do you mean the $2,000,000 between the three, or [fol. 960] just $2,000,000 for the two?

"Mr. Heney: The two.

"Mr. Swift: I do not know anything about that. The figures are not familiar to me, and I do not think I ever heard of them before."

Then again:

"Mr. Heney: Then, if you got $2,085,000 of bonds which bore 5 per cent, which is $100,000, and you got your two-thirds of that, which it would amount to, you would be getting your $66,000, just about what the arrangement was before? Was not that what Wadden told you was to take place?

"Mr. Swift: No, sir; I do not know that much about the details of how he was figuring it out. All I do know is that we did not get anything.

"Mr. Heney: Is not that what you expected, from your talk with him?

"Mr. Swift: That is what we claimed, but, as I say, we never got together; there never was an arrangement."

Then again:

"Mr. Heney: I expected you to tell me whether or not you expected to get that, and whether or not Mr. Prince gave you to understand you would get it.

"Mr. Swift: I have told you several times that it was our expectation to get it. I would like to add to that that we did not get it."

[fol. 961] Then again:

"Mr. Heney: Did he tell you at any time that Armour had an interest?

"Mr. Swift: No, sir.

"Mr. Heney: Did you learn that at any time before these public hearings of the Federal Trade Commission?

"Mr. Swift: All the knowledge I have got of the subject I have picked up at these hearings."

This is sworn testimony offered by counsel for the defendants, exactly what I intended to offer.

Mr. Smith: I invited you to offer it just before I put it in, and you declined the invitation; therefore I put it in.

Mr. Rynder: Continuing:

"Senator Norris: For 15 years you have been getting your share of the interest on the $3,000,000. Now, when this operation with Mr. Prince commenced, you expected to have

that, or its equivalent, continued if you remained in Chicago, did you not?

"Mr. Swift: I was in hopes to.

"Senator Norris. And you have not gotten that; you have not gotten anything out of that?

"Mr. Swift: No, sir.

"Senator Norris: And he remained in Chicago, and you remained, just the same, and did not get anything. What I am trying to get at now is this: is there some place where [fol. 962] you expect to get it yet?

"Mr. Swift: Why, I do not know of any place.

"Senator Norris: You understand Armour got his share?

"Mr. Swift: Yes, sir; from the evidence here.

"Senator Norris: Have you ever told any of the parties interested in it that you had not been treated right and you expected your share of that bonus?

"Mr. Swift: I have not made any such statement.

"Senator Norris: You have not made a demand on anybody?

"Mr. Swift: No, sir; I have not made any demand.

"Senator Norris: Do you know any way in which it could be done above board?

"Mr. Swift: I can only repeat, if a way was in existence that it could be done legally and above board, I might participate. If it has to be done illegally and not above board, I would refuse to participate.

"Senator Norris: At least, Armour did not get his above board, did he?

"Mr. Swift: I cannot comment, Senator. The evidence is all here, and one would have to be his own judge."

I think we have proved definitely that Swift & Company, the complainant in this case, has not now and has not had since 1907 any interest of any kind in the Union Stock Yard and Transit Company of Chicago, and if I use that now without using the others, I mean the group of companies. Now, [fol. 963] let us go back to this contract which was made in 1892. At that time the Elkins Act had not been passed. At that time the amendments to the Interstate Commerce Act had not been passed which gave the Commission for the first time real power over the practices of railroads. At that time, if you will recall the court decisions, there was no prohibition against a contract of this kind. The courts had said the only violation of law—you are getting on that rebate

line—it would be necessary to prove under section 2 was that the carrier actually carried some goods for one shipper cheaper than for another. It was not sufficient to show he merely charged less than his tariff rate. That situation probably led largely to the enactment of the Elkins Act. This contract—I state this rather by way of interpolation—in my opinion was not unlawful at the time it was made, but I do not care to argue that. I will waive that point, so that Mr. Smith will not have to cover it, because whether lawful or unlawful, it expired in 1907 and since that time, as shown by the evidence, there has been no ownership by Swift & Company in the Union Stock Yard and Transit Company of Chicago. The issues are framed as of this date and not as of 1891 or 1907. I would like to call your attention also to the fact that contract was made many years before and all of its terms expired many years before the passage of the Packers and Stock Yards Act in 1921.

Mr. Smith: I was going to remain silent when you made [fol. 964] the first statement that the contract had expired. However, if you are going to press it, I think I ought to say for the record that a reading of the contract will show very clearly it is in effect today and has not expired.

Mr. Rynder: Will you show me the provision?

Mr. Smith: Yes. I will be glad to.

Mr. Rynder: I think you mean the one about not moving our plant away from Chicago?

Mr. Smith: No, I do not.

Mr. Rynder: What others?

Mr. Smith: You apparently have not read this contract, Mr. Rynder.

Mr. Rynder: I have.

Mr. Smith: That does expire in 15 years, about moving away.

Mr. Rynder: The not moving away one is the one that is permanent.

Mr. Smith: The provision in paragraph 8 is still in effect. You are still bound under that provision on account of the consideration you received from the yards in 1891.

Mr. Rynder: That is the one I meant, about not moving away. I will read it to you, Mr. Examiner. "The said parties of the second part further covenant and agree that as long as the said Transit Company shall conduct the business of a general stock yard for cattle and livestock at the City of Chicago, State of Illinois, on its premises aforesaid

[fol. 965] or any part thereof, they and said Swift & Company and said Fairbank Canning Company will not, nor will any of them, within the limits of the city of Chicago, establish or carry on, directly or indirectly or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own livestock." There is apparently in the terms of the contract no limitation placed upon that, and you will observe that it provides that we shall not be interested in any stock yards in the City of Chicago. On the face of the terms of the contract, that is still binding, but if so, it is the only one that could be enforced as a contract matter by the Union Stock Yard and Transit Company of Chicago, and as a matter of fact it has been violated by us with impunity for all of the time of my service as attorney for this company, which runs over some 20 years. Regardless of that contract, we enlarged some old facilities and built stock yards of our own adjacent to the plant of the Omaha Packing Company, as has been indicated heretofore in the record, and there have been decisions of the Commission where the rates to that point have come up; so, if we are still bound by it, it is not any right that the railroads could assert in this case. It is a right that only the Union Stock Yard and Transit Company could assert by a suit for damages and it is totally irrelevant to the issues in this case whether or not we are bound to deliver all of our livestock to the Union Stock Yard and Tran-
[fol. 966] sit Company. Mr. Smith kindly furnished the answer to that by an exhibit showing we deliver practically none there, and I think in the past few months it has been literally almost no cars. So first, that paragraph, if binding, asserts a right that could be asserted only by the Union Stock Yard and Transit Company. Secondly, it has been shown that in actual practice that paragraph has been disregarded. It certainly could have nothing to do with the issues in this case. I was about to refer to this point, that the Packers and Stock Yards Act of 1921, which could probably have made this contract unlawful, was not in existence until some time—I guess, about 47 years after this contract was made, and some 14 years after it expired. So, I fail to see how that contract can be relevant to any issue in this case. Now, the next point in connection with my motion to strike refers to suits brought in Chicago by Armour, Morris and Swift. I think when you have a chance to read them, you

will find that they were seeking to attain the same result by a suit in court that we are now attempting to attain by this complaint before the Commission. It was in the year 1891, and the traffic like we have at the present time was not developed. These parties filed a suit in court to obtain substantially the same relief we are attempting to obtain here. But, so far as those suits are concerned, they never went to trial. They were dismissed. When you have a chance to [fol. 967] read this contract, you will find that that is one of the considerations there stated. Those suits are referred to as follows in the contract which is exhibit 47: "Whereas, the said parties of the second part have purchased and acquired certain premises at Packington aforesaid, known as the 'Central Stock Yards', near the yards of the said Transit Company, and have constructed and erected on said premises various platforms, pens, sheds, railway sidings, &c., for the purpose of receiving and distributing among themselves any and all cattle and livestock owned or purchased by them outside of the city of Chicago, or directly consigned to them or either of them, and thereby avoiding the payment of any yardage charges to the said Transit Company, and have demanded that the said Transit Company permit the use of their railway tracks for the transportation and delivery of such cattle and livestock to their said Central Stock Yards, and said Armour & Company, Swift and Company, and Nelson Morris & Company have recently commenced three several suits in equity in the Circuit Court of Cook County, State of Illinois, against the said Transit Company, claiming and demanding as relief that the said court by order and decree compel the said Transit Company to afford facilities over its railways for the transportation and delivery of any and all cattle and livestock belonging or consigned to them or any of them or to said Central Stock Yards without the payment of the usual yardage charges thereon as heretofore paid by them and collected [fol. 968] by said Transit Company; and

"Whereas, if such parties succeed in such litigation and discontinue purchasing livestock at such yards of the Transit Company to the extent of the capacity of said Central Stock Yards, the demand and market in Chicago for livestock would be diminished to the extent of over 500,000 cattle per annum", and so forth, with a further "whereas", that the suits have been dismissed. Now, those suits were filed, as I say. It is apparent on the face of it, the purpose

for which they were filed. They were never brought to trial. They really fit into this contract, exhibit 47, because they were one of the considerations stated in the contract, the dismissal of those suits, because of the fact that if they were successful they would be injurious to the Union Stock Yards. I fail to see in what respect the filing or dismissal of those suits can be relevant to an issue today as between Swift & Company, which has no interest whatsoever in these stock yards, and the railroad companies, who deliver the livestock at those stock yards. The next document in connection with my motion to strike is pages 189-277 of the Federal Trade Commission report, because it states—I will have to refer to it without giving the exhibit number. In fact, I believe Mr. Smith did not have it here yesterday. He has still to offer it, or to furnish it.

Exam. Carter: No. That is put in the record. You are referring to the pages of the Federal Trade Commission report?

[fol. 969] Mr. Rynder: Yes.

Exam. Carter: That went in.

Mr. Rynder: Oh, yes. I mean, the part dealing with ownership of these stock yards by packers.

Mr. Smith: Yes. That went in. You offered part of it, and I offered the part you did not offer relating to that subject.

Exam. Carter: That has not been physically filed yet. Is that what you mean, Mr. Rynder?

Mr. Rynder: Yes.

Mr. Smith: That is right.

Mr. Rynder: I take it that this case has to be decided upon the facts as they stand now, and not as they stood at that time. While in that portion of the report there are many misstatements of fact which I considered so immaterial I have not even mentioned them here, I assumed, for some reason or other, that the important part of it was pages 24 and 25 relating to the ownership of stock yards. In that connection, I have shown you the consent decree. I have shown you what has happened under it, and you know the result, that Swift & Company was not even reported here as having any interest in the Union Stock Yard and Transit Company of Chicago. The fact is, it never had such an interest. I cannot see the relevancy of its ownership of stock yards at other points; but if there is any relevancy to it, the facts are not those that are in the Heney

[fol. 970] report. Since that time there has come the consent decree and the disposition of those assets as described to you by the witnesses here. That will be more fully shown, of course, by the orders which I intend to have certified. I want to be sure and remember to ask leave to have time within which to file those.

Mr. Smith: You mean, the orders that will be looked at next Wednesday? Is that what you are offering now?

Mr. Rynder: Not now. Since Mr. Smith was to examine them, I would prefer they be in the record, but it will take me a little time to get certified copies from the clerk of the Supreme Court of the District of Columbia. Off the record please, Mr. Examiner.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: You want permission, as I understand it at this time, to file those copies as part of the record?

Mr. Rynder: Yes. The only reason I mention them now is, I am asking you to assume for the purpose of this argument they will show what the witness Chaplin stated yesterday about the various orders of the court.

Mr. Smith: Now, if that is a request for authority to file them, then I think you ought to state a little more specifically what it is you are going to file. I am not quite clear on it myself.

Mr. Rynder: Well, I would like to look through that file [fol. 971] again and see; but, specifically we have in here the consent decree, and beyond that I had intended to file these documents without necessarily limiting myself: the first plan submitted and approved by the court.

Exam. Carter: You mean, for disposition of the stock yard holdings?

Mr. Rynder: The first plan submitted and approved after the consent decree was made. I believe that carried on until 1925, when the decree was suspended for a period. If there is any intermediate order there, I desire to file it. Then, there is the order under which the stock was put in the hands, I believe it was, of Harry S. New as trustee, he having been recommended by the department of justice and approved by the court. Then there is the order later appointing Mr. Walsh trustee with power to sell. And finally there is the order of the court authorizing the sale of our holdings in 1936, to United Stock Yards Corporation.

Now, if there are some intermediate orders in there that ought to be there for the purpose of continuity, I want to put them in. Those are the outstanding points in my mind at the moment.

Mr. Smith: You are not withdrawing your offer to permit us to go to Mr. Veeder's office and make an examination of those documents?

Mr. Rynder: No, sir.

Mr. Smith: Thank you.

[fol. 972] Exam. Carter: Very well. Proceed.

Mr. Rynder: I meant merely that because that was to be done, I wanted the documents to be before the Commission, so the Commission could place its own construction on them, rather than Mr. Smith's construction. We expect Mr. Smith to examine them any time at his convenience commencing on Wednesday. Since this portion of the Federal Trade Commission report states no fact that is true as of the present time, so far as the Swift group is concerned as to ownership of stock yards stock, I believe for that reason it is irrelevant and immaterial in this case. I cannot for the life of me see in any way what relevancy there would be if we still owned stock in a stock yards at another point, even if that were the present fact; however, the report states no present fact about stock yard ownership of the Swift group. Now, I would like to go back to what I have referred to as the mud slinging here. I think I will not have much trouble in convincing you that that is so. With reference to the exhibit that contains pages 23 to 27 of the report of the Federal Trade Commission, I will deal first with merely their recommendations: "1. That the Government acquire, through the Railroad Administration, all rolling stock used for the transportation of meat animals and that such ownership be declared a Government monopoly."

"2. That the Government acquire, through the Railroad Administration, the principal and necessary stock yards of [fol. 973] the country, to be treated as freight depots and to be operated under such conditions as will insure open, competitive markets, with uniform scale of charges for all service*d* performed, and the acquisition or establishment of such additional yards from time to time as the future development of livestock production in the United States may require. This to include customary adjuncts of stock yards.

"3. That the Government acquire, through the Railroad Administration, all privately owned refrigerator cars and all necessary equipment for their proper operation and that such ownership be declared a Government monopoly.

"4. That the General Government acquire such of the branch houses, cold-storage plants, and warehouses as are necessary to provide facilities for the competitive marketing and storage of food products in the principal centers of distribution and consumption. The same to be operated by the Government as public markets and storage places under such conditions as will afford an outlet for all manufacturers and handlers of food products on equal terms. Supplementing the marketing and storage facilities thus acquired, the Federal Government establish, through the Railroad Administration, at the terminals of all principal points of distribution and consumption, central wholesale markets, and storage plants, with facilities open to all upon payment of just and fair charges." That is not the mud slinging part. I would like to call your attention to the fact [fol. 974] that a bill intended to carry out in detail these recommendations was introduced in the 65th Congress by representative Simms, who was at that time chairman of the committee on interstate and foreign commerce. That bill is set forth at page 11 and following pages of a document entitled, "Control of Meat Packing Industry, Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, 65th Congress, Third Session, H. R. 324, December 20th, 1918, part 1." It continued through other parts, and there were similar hearings in the Senate. As to those recommendations so made by the Federal Trade Commission, after full and complete hearings not a single one of them was adopted. While I do not need to offer a United States statute in evidence, yet just for your Honor's convenience, if you care to glance at it, that is the law that emerged from these hearings. After full hearings that law did not provide any change concerning rolling stock for the transportation of meat animals or any change in connection with the ownership of stock yards. In fact, there is nothing in the Packers and Stock Yards Act that would prevent any packer from owning any stock yards, any packer except those named in the consent decree, as far as the law goes. They could still own all the stock yards they could buy. It contained no provision changing the law as to the operation of refriger-

ator cars and it contained no provision changing whatever the existing law may have been as to branch houses, cold storage houses, and so on and so forth. What that law did [fol. 975] principally was two things. One section applied to packers, and without meaning to be too exact, this is just what it did: It wrote into that act as applied to packers the provisions of the Sherman Anti-Trust Act and of the Clayton Anti-Trust Act and gave jurisdiction of the enforcement of it to the Secretary of Agriculture. That is what it did to packers. It simply transferred the existing jurisdiction of the Federal Trade Commission and perhaps the department of justice to the Secretary of Agriculture. As to stock yards, it set up a form or regulation that—well, if you read parts of it, Mr. Examiner, you will think it is the Interstate Commerce Act of 1906—providing that the Secretary might prescribe reasonable rates and practices, prohibiting undue prejudice, and so forth. So, that is all that Congress did after full consideration and full hearings and, I might say, lengthy debate in connection with these recommendations of the Federal Trade Commission. Now, I would like to add to that, at approximately the time of this Federal Trade Commission report, the Commission has conducted an investigation into private cars which is set forth at 50 ICC 652, the decision being in 1921. That was years after the Federal Trade Commission report. The Commission found very little fault, if any, with the then operation of private cars. I believe the only recommendation—it was not an order—was a recommendation which, recommended the packers should not own icing stations through which the goods [fol. 976] of other packers passed, and that recommendation was adopted by the selling of those icing plants. It did nothing whatsoever concerning the status of private cars, but even if that were so, as I have proved here, we have none. Later on the Commission made another investigation into privately owned refrigerator cars, 201323 and quite a complete investigation. We were not a party to that case and we owned no cars at that time, but there was no such recommendation made by the Commission as that contained in the report of the Federal Trade Commission. There were, I believe, some regulations to the effect that after two years the practice of advertising should be eliminated; and that where a car company leased cars to a shipper he could not pay back to the shipper the difference

between the mileage he had received of the railroad and the cost of operating the car, by the shipper. We are not concerned with either of those things, but they were both far and far away from anything recommended by the Federal Trade Commission. So much for that. The recommendations that the Commission made were definitely denied by Congress and in its own investigations the Commission has found nothing to warrant the recommendations that were made by the Federal Trade Commission. Consequently, it seems to me that that portion of the Federal Trade Commission's report is utterly irrelevant to any point here. I am speaking of the recommendations. Now, we come to the rest of it—or, some other parts of it, I should say:

[fol. 977] "It appears that five great packing concerns of the country—Swift, Armour, Morris, Cudahy and Wilson—have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands.

"The producer of livestock is at the mercy of these five companies because they control the market and the marketing facilities and, to some extent, the rolling stock which transports the product to the market.

"The competitors of these five concerns are at their mercy because of the control of the market places, storage facilities, and the refrigerator cars for distribution.

"The consumer of meat products is at the mercy of these five because both producer and competitor are helpless to bring relief.

"The Commission, through Mr. Heney, had to meet deliberate falsification of returns properly required under legal authority; we had to meet schools for witnesses where employees were coached in anticipation of their being called to testify in an investigation ordered by you and by the Congress of the United States; we had to meet a situation created by the destruction of letters and documents vital to this investigation; we had to meet a conspiracy in the preparation of answers to the lawful inquiries of the Commission."

[fol. 978] In other words, we are the biggest set of liars that ever lived. I call your attention first to the fact that that was an Ex Parte investigation, but not in the sense in which that term is used before the Interstate Commerce

Commission. No packer there under investigation was allowed to put on a witness of his own. No packer was allowed to cross-examine a witness that Mr. Heney had called. No packer was allowed to explain any document. If you want a picture of the hearings and the way they went on, I myself could testify to facts as to the hearings at Chicago.

Mr. Smith: You have not done so, however.

Mr. Rynder: Do you care to swear me? I will take my oath.

Exam. Carter: You are making an argument now, Mr. Rynder.

Mr. Rynder: I will say, I am willing to take the stand and testify to the facts, and I as an honorable attorney in my argument say it is true: that I was present at many of those hearings; that they were called suddenly; that the packers were not allowed to examine a witness, explain a document or cross-examine any witness put on by Mr. Heney; that it was conducted as a newspaper show; that no member of the Commission was sitting, at least here; that what would happen wo ld be Mr. Heney would bring in something he regarded as scurrilous or something that would make a newspaper headline and telephone the newspaper boys to be there; that was the hearing; he would read it to them and sling it at the Examiner and tell him to put it in the record. That [fol. 979] I would just as soon take the stand and testify to because I saw it myself. That was the way that hearing was conducted. I will mention just one more thing to give you an example of how the hearing was conducted and what methods were used. One letter would be torn out of one file apart from any context, or apart from anything that might explain or modify the contents of that letter. One notable example that I happen to remember was that that being war time, Mr. Hoover had set the prices that we were to pay for products, as well as prices for stuff we were to sell, the idea being to create very quickly a great production in agricultural markets. As related to the stock yards out here, at the end of the war under Mr. Hoover's orders we were paying $18 per hundred for hogs, but the government compensated us by providing that they would take enough of the products off the market for the army and for the allies and so forth to enable us to pay that price for hogs, and they fixed the price. It did the same thing as to cottonseed oil, providing as to what we should pay and what we should receive when we sold. So, Mr. Heney seizes a letter out of the file of the

company pertaining to these orders of Mr. Hoover as to the prices we should pay and the prices at which we could sell, and relating solely to that, and offers it by itself as proof of a conspiracy or some understanding about prices not permitting us to prove that the price situation was one which we were corresponding about because it was government orders as to how much we should pay and how much [fol. 980] we should get. I can hardly let this go by—because your Honor is liable to overrule me and leave this evidence in for what weight it has—as I say, I can hardly go by without calling your attention to some of the peculiar qualities of Mr. Heney. He was a man, to say the least, of a violent temper. Before his career in this investigation he had shot a witness in court in one case, and in another case a prospective juryman had shot him. That might have been a perfectly proper way of working out their problems or their troubles. I do not know.

Mr. Smith: Are you speaking now of the qualifications that got him the job?

Mr. Rynder: What?

Mr. Smith: Are you speaking now of the qualifications he had for getting this job?

Mr. Rynder: No, but I will come to something that is shown by the very document to which Mr. Smith referred. I do not know whether it is a crime against any law of the United States in the trial of a criminal case to hire a detective to go out and examine everybody that can possibly be a prospective juror and then arrange to find out from them, in advance definitely whether they will vote for the conviction of the accused, and then have the jury box fixed up with no persons on it except those who have definitely promised in advance to swear to vote for the conviction of the accused. [fol. 981] That was Mr. Heney's record as brought out in this very Congressional Committee. To summarize it, he had been placed in charge of the prosecution against Jones and a number of other people for stealing land, government land. He employed a detective for the purpose I have just named, and certain of the defendants were convicted under those conditions. Thereafter, their counsel apparently found out what had happened and they appealed to the president for pardon. It was referred to the attorney general who made a report and regretted he had to say these men must be pardoned because of the tactics used by Mr. Heney in obtaining a jury. I refer to page 2213 of the hear-

ings of the Committee on Interstate and Foreign Commerce, House of Representatives, 65th Congress, Third Session, January 31, to February 14, 1919, part 5, where Mr. Dewalt, a member of the committee, quoted part of the report of the attorney general of the United States to the president upon this subject matter. Mr. Dewalt said: "In addition to this an affidavit was received on the 12th instant from C. N. Mac Arthur, who was one of Burns' agents in the field, and afterwards speaker of the House of Representatives of Oregon. Mr. Mac Arthur makes a complete disclosure of the whole situation which leaves no possible ground for doubt. Among other things he states: on or about January 25, 1905 the jury box was filled. On August 17, 1905, Burns telephoned to him he wished to see him in the district attorney's office. While there, in the presence of Francis J. Heney, Burns tendered him a typewritten list and said: [fol. 982] * * * 'Here, Mac, is a list of prospective jurors from several counties. Take it and weed out the s—s of b—s who will not vote for conviction and return it to me as soon as possible, for we are going to make up a new jury box and we want to be sure no man's name gets into the box unless we know he will convict, for by G—d, we are going to get Williamson this time, and you can bet your sweet life we will send this whole d—d outfit to jail where they belong.' That is an excerpt from the complete report of the attorney general which commenced at page 2214 and continues through page 2218, winding up with this recommendation of the attorney general: The course of the executive, however, seems to me to be clear; that is, he cannot countenance the methods employed in the prosecution of these cases * * *"

Exam. Carter: Mr. Rynder, I can only give you ten minutes more. You have had one hour and twenty minutes so far.

Mr. Rynder: If you want a scathing denunciation of the tactics employed by Mr. Heney in Chicago in this hearing you will find it in the case of Veeder versus the United States, 252 U. S. 414. I would like to tell you the facts in that case, but I do not have the time. The first section, pages 23 to 27, deals solely with recommendations which were never followed anywhere, as I said before. They have no relation to this case, and were nothing but most deliberate falsehoods and scandalous, scurrilous and unproved

statements against the packers who were in there. I can [fol. 983] see from no angle any relevancy in any way to anything contained in pages 23 to 27, which your Honor will have time to read. In conclusion, my position is that if every piece of mud and dirt contained in that report were true, and if Swift & Company did up to 1907 receive interest on income bonds of the Union Stock Yards that, under present day conditions, those would not constitute facts which a judge could honestly weigh in his mind in deciding this case as of this time.

Exam. Carter: Can you give me an idea of approximately how long you want, Mr. Smith?

Mr. Smith: I do not think I shall take very long. I think it will be some time less than one-half hour at the outside.

Exam. Carter: We will recess for a few minutes.

(A short recess was taken.)

Exam. Carter: Come to order.

Mr. Ryder: I had overlooked one thing which I wanted to say, which will not take but a minute, about the investigation being ex parte. At page 205 of the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 65th Congress, Third Session, *RB* 13224 the following appears:

"Mr. Dewalt: Let me ask you another question. You say you were not at these hearings. Were these hearings private hearings?

[fol. 984] "Mr. Colver"—chairman of the Federal Trade Commission—"They sat in the room at the hearings, yes; they were at the hearings in a way, but I mean to say that they had the ear of the Commission and did come and talk to the Commission; but, wait a minute, and you will pardon me, because I do not want to seem to make it appear now I am trying to avoid the question. I am not. I do not want this record to appear that I am trying to avoid the question, that these gentlemen were not permitted to call witnesses and to examine witnesses who were called. That is a fact. They were not allowed to do that.

"Mr. Dewalt: Then we have a definite statement by you, as I understand it, that these five concerns concerning which said complaint is made, did not have the opportunity to call witnesses on their behalf, nor did they have the opportunity to cross-examine the witnesses that were here before you?

"Mr. Colver: That is an exact statement."

That is all I have.

Exam. Carter: Mr. Smith.

Mr. Smith: Mr. Examiner, counsel has read somewhat extensively from exhibit 60, which is the letter to the president from the Federal Trade Commission at the close of this investigation. I offered that letter and stated at the time, because it states that the five big packers which are so frequently referred to in other places in the complaint, include Armour and Swift and others whom we know to be [fol. 985] in that category. That was the purpose that letter was offered for. I think, however, in view of the untimely remarks Mr. Rynder made at the Washington hearing with reference to the character of that investigation, it is entirely appropriate this record should contain not an answer of defense, but an answer of the Federal Trade Commission itself to those charges. Mr. Rynder insists that what is said in this report constitutes mud slinging on the part of the Federal Trade Commission. I did not know what the possibilities, the real possibilities of mud slinging were until I heard Mr. Rynder open up on Mr. Heney, and if we are going to give thought to the possibilities that this Federal Trade Commission hearing was an ex parte hearing, we ought to note in passing that Mr. Heney has had only an ex parte hearing, too, in connection with these charges which Mr. Rynder makes. I am not going to do either Mr. Heney or the Federal Trade Commission an injustice by making any defense on their behalf. I think it is proper to note, however, that the last paragraph of this letter has something to say about Mr. Heney's conduct in this case. I suppose it was prompted by the fact he had been put under severe pressure by the packers during the course of this hearing. The letter closes: "We will not trespass upon your time to go into details as to the legal and business ethics employed, but on the foregoing statement, which we are prepared to substantiate in every detail, we contrast the ethics of the Commission's legal and investigating staff with the legal [fol. 986] staffs of the five great companies. And in leaving this part of the subject, we say as we have said repeatedly to you during the time of the investigation, that Mr. Heney's conduct of the case, as well as that of the other agents and attorneys of the Commission, was under

the direct supervision of the Commission, the acts were performed with the knowledge and under the direction of the Commission, and the Commission assumes all responsibility for them."

That is signed by William B. Colver, Chairman; John Franklin Fort; and Victor Murdock, who I believe at one time was United States Senator from Kansas. Mr. Rynder seems to have the understanding that the relevancy of much of this material depends upon whether or not Swift & Company acquired an interest in the so-called Maine company. He draws a very sharp distinction in his discussion between the situation in that regard of Swift & Company, and the situation of Armour & Company, which he was at pains to delineate here at some detail. I think it is unfortunate that counsel for Armour & Company could not be here this morning to answer that portion of the argument. Dealing with the merits of this question, which have yet to be discussed, Mr. Rynder's statement constitutes a complete misconception of the primary effect of this evidence, and the very intimate relationship it bears to this issue. I do not think in his statement he has attempted to mislead the Examiner. I think he simply does not understand the real significance of this evidence. [fol. 987] I want to refer just a moment to what is certain to be the law of this case, and then to relate this evidence to the law of the case. The Supreme Court of the United States, in Adams versus Mills, and in the Hygrade case, for example, among others have said that the question where transportation ends is a mixed question of law and fact. It depends upon the circumstances. In the Hygrade case, for example, they said that usage and physical conditions had operated to end transportation at a certain point. I would like to emphasize that word "usage"; custom; practice. There is an opinion by Mr. Cardozo, before he went on the Supreme Court, that is singularly apt in this connection. He is talking about the delivery of carload traffic. He says: "The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution of that problem. The limits of place within which delivery is due will vary with varying conditions. * * * All that we can safely say is that there must be such a delivery as is customary and reasonable. We come back then to the test, which, vague

as it is, remains the only safe one, and we ask ourselves whether, in the light of all the circumstances, such a form of delivery is customary or reasonable."

Then I read from another three-judge case: "We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable [fol. 988] decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required as is customary and reasonable." It is in this record that from the very earliest time, in the 1860's, yardage charges were assessed and were collected by the yards company and retained by the yards company. In other words, the shippers pay the transportation charges which carried them up to the point of unloading, and then they pay yardage charges to the yards company. Mr. Henkle testified that those yardage charges were collected and retained by the yards company, so that from the time of the early 1860's we had a practice and custom representing and reflecting what was in the minds of the parties to the transactions, as to where transportation ended. Then, in the early 1890's we had a set of circumstances which operated very categorically and definitely to fix that custom and practice and make it unmistakably clear, as to what the intention of the parties was from that time forward. Those circumstances and events are covered by the exhibits that have been offered in this case. The packers, finding that their patronage was of very great value to the Union Stock Yards, either decided they would capitalize on that, or they decided in good faith that they ought to move some place else. Or, perhaps, as a third possibility, they decided if they could not capitalize on the strategic position they held, then they would move. So they bought some properties, which, [fol. 989] as I understand it, were located some place in the vicinity of what is now Gary, Indiana. That is one thing they did. Then they built what is described in this record as Central Stock Yards, and it is very definitely described in this record. It is adjacent to their plants and they alleged it and asserted it to be an ample stock yards for the receipt of traffic. Then as the third step, they brought an action in the state courts of this state to require the Union Stock Yards, then operating its railroad, to permit the traffic, the livestock traffic, to be moved down

to this new Central Stock Yards. The affidavits which are filed in the case and the complaint in this case establish very clearly at least as the representations of this complainant, that the railroads were entirely ready and willing to take those cars of livestock over the tracks of the stock yards down to this new Central Stock Yards. Swift and others filed affidavits of officers of these railroads who averred they had taken these cars down to the point where they would move them over the tracks to the Central Stock Yards, and that the stock yards had refused to permit the trains to pass over their tracks down to the Central Stock Yards. That is all alleged in this suit that was filed. So, we come to this point: after this practice had gone on, of stopping transportation at this point where the animals were unloaded, and dealing thereafter with the yards company and paying them yardage, you come to the point where these packers evinced at least an apparent purpose to [fol. 990] change that practice. Well, it was with that background that they entered into this contract, and in this contract of which I want to read two or three provisions, they compromised their case. They dismissed their case. They sold to the yards their Central Stock Yards. They sold to the yards the land they had bought in Indiana and in return for that—and I shall point out in a moment or two that they did another, very significant thing—in return for those things they took these bonds. Mr. Rynder has talked about the fact they got interest on those bonds. Of course, they also got the principal on those bonds.

Mr. Rynder: I said that.

Mr. Smith: I am sure there is no misunderstanding on that point.

Mr. Rynder: At least, my witnesses stated it. My witness stated it yesterday.

Mr. Smith: I read paragraph 4 of exhibit 47: "The parties of the second part further covenant and agree, that during the period of 15 years"—the parties of the second part are the packers—"from the 1st day of July, 1891, unless the Transit Company's yards are during that time removed from the city of Chicago, and in such event, then until such removal within said period, they and said Swift & Company and the Fairbank Canning Company shall and will continue their several businesses and slaughtering, packing or canning plants and establishments at Packingtown, aforesaid and covenant, undertake and guarantee

[fol. 991] that any and all cattle and livestock slaughtered by them or any of them, or said companies or either of them, on their said premises or within 200 miles of the city of Chicago, during such period, shall pass through and use said yards, and pay the usual yardage and charges therefor." They could not more specifically describe direct shipments, "all livestock slaughtered by them coming into Chicago, shall pass through the yards and shall pay yardage charges". Now, the next paragraph provides: "The said parties of the second part further covenant, undertake and guarantee that the said Transit Company shall receive and collect from its yardage and charges on cattle and livestock, owned or purchased by or consigned to said parties of the second part and said companies, at said yards, the aggregate sum of at least two million dollars ($2,000,000) within six years of said 1st of July, 1891." Now, the significance, and the very great significance of that arrangement is the fact that after all these years where there had been a recognition, let us say merely a tacit recognition that transportation ended when the animals were unloaded and that the packers dealt with the yards thereafter, they come to this fact, or play, or whatever it was, when they propose to take this stock at a different point and by their own affidavits they show that the railroads were ready to assist them in taking the stock at that other or different point. They then entered into this contract under which, in perfectly plain words and figures, they recognize that they [fol. 992] are dealing with the stock yards company with reference to yardage charges and they say that they will bring their animals through there and that they will pay yardage charges on them and that those yardage charges which shall go to the yards will be not less than two million dollars in six years. Now, the effect of that is, it is just as plain a recognition as can be made that these parties all knew at that time that they had a commodity there, the handling of these animals, these direct shipments, that they knew was worth something. They knew that they had to deal with the yards. They so recognized that transportation and the service of the railroads ended when the animals were unloaded. They made this definite agreement that they would go on bringing animals into the Union Stock Yards and paying yardage charges on them. It is one thing to have to prove an understanding and a custom and usage

by acceptance and by actions which are not spelled out. It is quite a different thing when you have a plain statement of the situation drawn up by the parties themselves, when they recognize exactly what that usage was, that transportation ended at the unloading chutes and from there on they were dealing with the stock yards. They recognized at that time, and I think they recognize definitely now, that they had not already paid for that yardage when they paid for their freight rate. This whole thing is totally inconsistent with that situation. They recognized they had something there [fol. 993] which was yet to be paid for, namely, the yardage charges on these directs, and recognizing that they agreed with the yards they would continue to deal with the yards. If anything was necessary to make usage which had continued then for some 15 or 20 years, definite and explicit and unequivocal, these documents certainly accomplish that purpose. There is one further provision in this contract that is most important. That is the one Mr. Rynder read to your Honor, after he had made the statement that the contract expired in 15 years, and his attention was called to this provision. The packers agreed that for 15 years they would not leave the yards, but then they entered into this further contract that not at any time would they be interested in or concerned with any other place for the delivery of livestock in Chicago. It is entirely a matter of unimportanee from our point of view whether the yards chooses to enforce that contract, or even have enforeed it. What we are talking about here is the attitude of mind of these people, what everybody believed. You can go in 50 years later and undertake to change positions and take different views if it is not in writing. However, we have it in writing here as to what all the parties to these transactions understood. Now, what is the significance of this particular provision in which they agree that not so long as the yards is doing business here, will they be interested in any other place for unloading stock? Why did the yards care about that? What is the background? Why did the yards ask [fol. 994] that that provision be put into this contract and why did the packers agree to it? Well, the yards asked that that be put into the contract for the obvious reason that they wanted these direct shipments to continue to flow through the yards, not only for the 15-year period, but for this unlimited period expressed in this provision. Why did the packers put it in? Well, it had been the practice and

custom for years to bring those animals in there and pay those yardage charges, and they got three million dollars in bonds for the various things they agreed to do in this contract. Now, we come to the report of the Federal Trade Commission. The Federal Trade Commission made a very full report, as your Honor will see when he reads the documents. It was testified here yesterday that the Federal Trade Commission called upon the packers for many documents and statements and the witness in his brief testimony referred to one he himself had compiled which he said was correct as it appeared in the report. He testified also that the Federal Trade Commission came out and examined the books thoroughly, with a force of 15 or 20 men for an extended period, and it was after all that that they made this report. What is the importance of this report in this case? Mr. Rynder seems to think it is a question of whether securities were obtained in the Maine Company. That was explicitly pointed out by the testimony he read that the particular Swift who appeared in the case said he or his company—I am not sure which—had received no stock in [fol. 995] the Maine company, but Mr. Rynder pointed out that Armour had received some, and he thinks that is the test of the relevancy and importance of that document. It is not at all. I do not know whether they received anything following the 1907 expiration of that contract or not. The Federal Trade Commission did not make any factual finding on that. It set it out and found evidence from which that could be concluded, and made that statement after a thorough examination of the company's books.

Mr. Rynder: Oh, no.

Mr. Smith: Following that report there were hearings on certain legislation that was under consideration in Congress. One of the Swifts appeared voluntarily. There was a good deal of question about that, as to whether he would gain immunity by coming and testifying at that hearing. Finally, after waiving immunity and being thoroughly advised he was there voluntarily he made these statements—Mr. Rynder has read some of them to your Honor. I see my time is rapidly expiring, and to avoid too much of a trespass on your good nature, I will refer to only one or two. Perhaps I do not need to read any of them, because they can be very briefly summarized. I do not know how this Mr. Swift who testified here fits into the Swift pattern. I do not know which one he was. I think perhaps he was

president. I think the document shows, in any event. It developed there that his testimony was "I have not re- [fol. 996] ceived anything." I do not know how inclusive he intended to make that, but what I am interested in that he said is this: he said that following the expiration of this 1907 arrangement, a committee was appointed to deal with the yards and consider the matter of perpetuating this bonus arrangement; and that it was as a result of all those negotiations he expected definitely this bonus would be continued and that Swift would be paid as before. In other words, that old arrangement that was embodied in this contract——

Mr. Rynder: There is some misrepresentation of the very things I read. He said he did not know anything about it. He said negotiations were going on. However, I will pass that.

Mr. Smith: He may have denied he was personally engaged in it, but he said he knew negotiations had gone on, and that he wanted this bonus continued, this 1891 contract arrangement continued and expected to get it.

Mr. Rynder: I beg your pardon. That is a misquotation.

Mr. Smith: All right. I will read it to you then.

Exam. Carter: I think I remember something that you read substantially along that line, Mr. Rynder. Of course, the document itself will show.

Mr. Smith: Here is just a word or two that will answer Mr. Rynder:

"Mr. Heney. I will come to that. Is it not correct that they did negotiate for several years, and that they finally [fol. 997] agreed that they would take the Felzer case to the Supreme Court of the United States to determine whether a bonus should be given, the attorneys for the New Jersey company opposing the giving or holding back of the proposition that the Supreme Court would hold that it was a rebate.

"Mr. Swift: We asked for a continuation of that.

"Mr. Heney: Of that—arrangement?

"Mr. Swift: Arrangement.

"Mr. Heney: And how much were you getting a year out of that arrangement?"

Mr. Smith: The arrangement is the 1891 contract.

"Mr. Swift: The evidence shows, I think, that out of that $3,000,000, we got about 30 per cent—perhaps $1,000,000, or close to it. That would cover a period of 15 years. That would be $60,000 a year."

I do not care whether Mr. Swift was disappointed in his expectation or not. That is wholly unimportant. The important thing is in attempting to find out what was in the minds of all these people with reference to where transportation ended. The important feature was that throughout this long period down to as late, perhaps, as 1919, whether they got anything or not, the Swift people expected that the old arrangement would be carried out and that they were continuing to deal with the yards company with reference to yardage on directs which was one of the vital things in this contract. It is the state of mind we are primarily seek-[fol. 998] ing to prove here, which is proved by Mr. Swift's own testimony as to what his expectation was, and what his understanding was and what he believed to be the situation. I say, from that point of view, the situation is precisely the same with respect to the Swifts who were disappointed in their expectations, who were told to keep quiet and did keep quiet, as it is with Armour & Company, who were more successful in getting what they actually expected. I think that is all.

Mr. Rynder: I would like about two minutes more, Mr. Examiner.

Exam. Carter: Very well.

Mr. Rynder: I would just like to say this: a present legal right cannot depend upon a past state of mind. Rebates were made before the Elkins Act and contracts were made for them, but after that act was passed, it was a prison offense. Whatever these parties may have had in mind during this period of years was a mere state of mind. The Commission, if I may summarize briefly, has held very definitely that the consignee is entitled to obtain livestock without a yardage charge in three or four cases which I have already mentioned, the last one being the Hygrade case, which, as I understand it, was reversed upon the ground the Commission's order went too far. That is a matter for argument. However, commencing with our demands in 1933 which are of record, we are asserting a present legal right. We cannot be denied that right because of a [fol. 999] former position or former attitude of that kind, any more than we can be denied the published freight rate on meat to New York, whatever it is at this time, because in 1890 we agreed to pay a higher rate. I think that just about summarizes what I have to say.

Exam. Carter: Gentlemen, I will rule on Mr. Rynder's mo-

tion in my proposed report when it is issued. I will make a specific ruling on it, which, of course, you gentlemen may have an exception to, and the Commission will rule finally on this motion in the final report.

Mr. Rynder: May I say a word off the record?

Exam. Carter: Yes. Off the record.

(Discussion outside the record.)

Exam. Carter: Is there anything further, gentlemen, before the hearing is closed?

Mr. Rynder: Just a moment. I believe I had handed to Mr. Smith a prospectus of the United Stock Yard Corporation which he said he wanted to look at. Have you looked at that, Mr. Smith?

Mr. Smith: I object to the submission of this document. I want to call attention to the paragraph which reads as follows: "Under the consent decree as modified by subsequent court order dated June 16, 1932, the shares of capital stock of stock yards companies owned by Swift defendants were transferred to a trustee who was entrusted with the power and duty of disposing of said shares and otherwise exercis- [fol. 1000] ing all rights incidental to absolute ownership except the right to retain dividends and receive the proceeds of sale independent of control by any of the Swift defendants, but subject to control by the court." Now, I asked Mr. Rynder whether there were any conclusions of that character in this document and he told me he understood there were not. This is very clearly one of the character I was inquiring about. This "independent of control by any of the Swift defendants" is responsive to the provisions of the consent decree, obviously, and we have testimony in this record of the witness Chaplin that this practice continued after that under the practical control of Swift & Company. That is to say, there was no change made in the officers, and it was I think clear to the Examiner from what he said that that continued after that time.

Mr. Rynder: I am not sure it——

Mr. Smith: May I finish?

Mr. Rynder: If you are through with that point, I would like to say something.

Mr. Smith: Go ahead and say what you have in mind.

Mr. Rynder: I simply want to offer the parts of that which show the purchases of the Swift stock.

Exam. Carter: Do I understand you are offering this solely for the purpose of showing the purchases of the Swift stock by this company?

Mr. Rynder: Yes.

[fol. 1001] Mr. Smith: That paragraph I have read shall be considered as not in evidence?

Mr. Rynder: That is right.

Mr. Smith: All right.

Mr. Rynder: I think it is a plain matter of fact that that matter is correct, but it is not important.

Exam. Carter: With that qualification, Exhibit No. 71 will be received in evidence.

(Complainants' Exhibit No. 71 received in evidence.)

Mr. Rynder: It is understood, I suppose, that I can arrange during the month of August to have copies of the orders I have mentioned following the consent decree made by the clerk in Washington and send them to the Commission for filing.

Exam. Carter: That is right. All papers you have been given permission to file, may be filed. All exhibits are received in evidence subject to the objections which have been raised thereto. Off the record.

(Discussion outside the record.)

Exam. Carter: Briefs will be due October 3rd, 1938. Is there anything further, gentlemen?

(No response.)

Exam. Carter: The hearing is closed.

(At 12:40 P. M. July 19th, 1938, hearing closed.)

[fol. 1002] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 27862

SWIFT & Co., et al.

v.

THE ALTON RAILROAD, et al.

Hearing Room "A", I. C. C. Building,

Washington, D. C.
Tuesday, June 20, 1939.

Before P. O. Carter, Examiner

Met pursuant to notice.

Appearances:

R. D. Rynder, 4115 Packers Ave., Chicago, Ill., appearing for Swift & Co.

Douglas F. Smith, Kenneth L. Burgess and O. Robert Thomas, 11 So. LaSalle St., Chicago, Ill., appearing for Defendants.

[fols. 1003-1004] Proceedings

Exam. Carter: The Interstate Commerce Commission has set for further hearing at this time and place Docket No. 27862, Swift & Co., et al. v. The Alton Railroad Company, et al.

This further hearing is for the sole purpose of permitting complainants make proof of the following facts:

1. The industry tracks serving the plants of Swift & Co. in the Union Stock Yards District at Chicago, Illinois, have no facilities by way of pens or chutes for the unloading of livestock.

2. The charge made by defendants for the delivery of a carload of livestock on an industry track serving the plants of Swift & Co. in the Union Stock Yards District in Chicago, Illinois, is a line-haul rate to Chicago which applies to deliveries at the chutes of the Union Stock Yards & Transit Company plus a charge of $3.25 per hundred pounds, subject to a minimum weight of 60,000 pounds, resulting in a minimum charge in addition to the Chicago rate of $19.50 per car.

Are the appearances the same as at the previous hearing?

Mr. Rynder: Same appearances.
Mr. Smith: Yes, sir.
Exam. Carter: You may proceed, Mr. Rynder.

[fol. 1005] (Discussion off the record.)

Mr. Rynder: I will call Mr. Barron.
Exam. Carter: You testified at the Chicago hearing, did you not?
Mr. Barron: Yes, sir.
Exam. Carter: Have you been previously sworn?
Mr. Barron: Yes, sir, at the previous hearing.
Exam. Carter: Do you want this gentleman sworn again, or is that sufficient?
Mr. Smith: I should think that that would be sufficient.
Mr. Rynder: Due to the fact that Mr. Barron was previously called as a witness, I will not go into his qualifications unless requested to do so.

M. J. Barron having been previously sworn, testified as follows:

Direct examination.

By Mr. Rynder:

Q. Mr. Barron, are you familiar generally with the railroad tariffs naming rates on live stock to Chicago and various points therein, particularly the Union Stock Yard District?
A. Yes, sir.
Q. Are you familiar with the track layout at the plant of Swift & Company at the Union Stock Yards in Chicago and with the various loading and unloading facilities at that plant?
[fol. 1006] A. Yes, sir.
Q. Can you state the charge made by the railroad defendants in case a carload of live stock were ordered by Swift & Company to be placed on an industry track serving its plants in the Union Stock Yards District in Chicago?
A. Yes, sir.
Q. Please proceed to state what that charge would be, referring to the applicable tariffs.

A. Well, to take a typical example, I prepared a memorandum of a typical live stock carrying road like the Northwestern.

Q. If you have that memorandum and tariff references, just proceed to read it.

A. Referring to the Northwestern Tariff ICC 10484, which names rates to Chicago from stations in Iowa, Minnesota, North Dakota and South Dakota, etc., Item 70 of this tariff, which is entitled "Application of Chicago, Illinois Rates", reads as follows:

"Except as provided in Item 50 (which is of no consequence here), rates named in this tariff from or to Chicago, Illinois, apply only on shipments loaded or delivered on the C&NW Railway tracks or on shipments received from or delivered to connecting lines. For basis of rates applicable from or to points located on connecting lines within Chicago Switching District see Agent R. A. Sperry's No. 20-T ICC No. 242."

Swift & Company is listed as an industry on the C. J. [fol. 1007] Railway and is in what is known as the "Middle District" according to the Directory of Industries published by Agent Sperry in his Tariff No. 22-BB, ICC 431.

By referring to Sperry's Tariff 20-V, ICC 365, to determine the rates applicable on a carload shipment of live stock delivered direct to Swift & Company plant in the Middle District, we find that on shipments from the C&NW Railway to industries on the CJ in the Middle District Rate Basis 6 applies. Upon referring to Rate Basis 6 to determine what rates are applicable, we find that an exception is carried in connection with Rate Basis 6 which provides that to facilities on the CJ Railway other than the chutes of the Union Stock Yard & Transit Company the rate basis indicated therein will not apply on live stock. The result is that to make a shipment to an industry in the Middle District, like the Swift plant, it is necessary to apply a combination rate. The lowest basis we have been able to determine is to make a combination over the rate to the chutes of the Union Stock Yard & Transit Company. In other words, the tariffs do not authorize the application of Chicago, Illinois rates to this terminal. This terminal of the Union Stock Yard & Transit Company is located in what is known as the "East 47th Street District" or the "Halsted Street District" on the CJ.

By referring to the CJ Railway Tariff No. 22-Q, ICC No.

[fol. 1008] 66, we find a switching charge is provided for inter-district rates in Item No. 175, which is 3¼ cents per 100 pounds, minimum weight 60,000 pounds, or a minimum of $19.50 per car.

Q. Mr. Barron, is that in the nature of an exception to the treatment accorded all other traffic reaching that packing house district?

A. It is.

Q. That is, on anything that might come in there such as coal, salt, meat, or any of the supplies you receive, would a flat Chicago rate apply?

A. Yes, sir, it does.

Q. Are you familiar with the industry tracks serving the plants of Swift and Company in the Union Stock Yards District at Chicago?

A. Yes, sir.

Q. Have you obtained from the office of the General Superintendent of your company a map showing the tracks adjacent to the Swift plant in the Union Stock Yards District at Chicago?

A. Yes, sir.

Q. Is the document I hand you the map in question?

A. Yes, it is.

Mr. Rynder: Mr. Examiner, I ask that that document be marked for identification as Exhibit 92.

Exam. Carter: The document shall be so marked.

[fol. 1009] By Mr. Rynder:

Q. Have there been placed upon this map legends showing for each loading or unloading dock the purpose for which it is used?

A. Yes, sir.

Q. Have you made a personal inspection of all the tracks noted in this map since it was prepared?

A. Yes, sir.

Q. On what date was that inspection made?

A. June 14th, this year, 1939.

Q. Based upon your inspection, is the map correct with respect to the location of loading and unloading docks, and the purposes for which they are used?

A. Yes, sir.

Q. Does this map show all of the industry plants serving the Swift plants in the Stock Yards District?

A. Yes, sir.

Q. Are there facilities by way of pens or chutes for the unloading of live stock on any of the industry tracks serving the plants of Swift & Company in the Stock Yards District in Chicago?

A. No, sir.

Mr. Rynder: Mr. Examiner, we did the best we could to have these legends marked as to loading or unloading chutes, and if any of them are not easy to read or are not [fol. 1010] understood from a glance at them, the witness will be glad to explain that; otherwise that will conclude my direct examination.

I ask that Exhibit No. 92 be received in evidence.

Exam. Carter: Exhibit 92 is received.

(Exhibit 92, Witness Barron, received in evidence.)

Exam. Carter: You may cross-examine.

Cross-examination.

By Mr. Smith:

Q. You are a lawyer, are you not?

A. Yes, sir.

Q. Take the tracks that run alongside the buildings numbered 9, 21 and 7, I call your attention to the track immediately adjacent to the north side of those buildings, and I ask you what the capacity of that track is?

A. It has a capacity of 6 cars.

Q. Now, I notice on this map that there is an open space just north of the hatched line, which seems to represent the east boundary of these buildings. What is that open space, a dock?

A. I want to be sure we are referring to the same thing. Yes, that is the east boundary and there is a dock on the northern end of those buildings, that is, a dock that juts out over the track they put in for loading and unloading truck shipments.

Q. The top of the map is north, isn't it?

A. That is right.

Q. And then that hatched line represents the east line of [fol. 1011] these buildings, does it?

A. That is right.

Q. And between the line of the buildings and the track, which you say holds 6 cars, there is a platform?

A. That is right.

Q. And how wide is it?

A. I would say about 10 feet.

Q. And when a car is placed on that track, how far is the car from the east edge of that platform?

A. The inner side of the car, the side of the car that juts on the building, you mean?

Q. Yes.

A. I would just have to guess; I would say a foot or two.

Q. You don't know exactly?

A. No, sir.

Q. And is there traffic freight unloaded from cars placed on that track into the building?

A. Yes, sir.

Q. There are doors in House No. 9 and House No. 21, for example, that furnish ingress into those buildings, are there?

A. Yes, sir.

Q. And then inside those buildings you have substantial storage space for live stock, do you not?

A. Not at those plants with the doors open. The live stock [fol. 1012] in those buildings are stored upon the roof in pens.

Q. Just on the roof?

A. Well, they start them up at the roof and——

Q. (Interposing:) How many floors actually do you store live stock in in that building?

A. As a matter of fact, they don't store live stock at all in the building; I mean it is just held temporarily; they rush it in and kill it afterwards.

Q. Now, what floors is it held on, as you said, temporarily?

A. Top floor, but I don't know which one that is.

Q. As a matter of fact, isn't there storage capacity on four floors of that building?

A. I couldn't say that there is or there isn't.

Q. You just don't know?

A. That is right.

Q. And you don't know what the capacity of those holding pens is?

A. No, sir.

Q. And you don't know, I take it, whether it is for cattle and hogs or——

A. (Interposing:) I do know that.

Q. What is the storage for?

A. Hogs.

Q. And would your recollection be refreshed if I sug-
[fol. 1013] gested to you that your storage capacity on those four floors was for about 4,000 hogs?

A. No, sir, because I wouldn't have anything to base my recollection on; that is out of my line.

Q. That is out of your line?

A. Yes.

Q. Well, this whole thing is more or less out of your line, isn't it, Mr. Barron?

A. As to the number of hogs they hold there, yes.

Q. I mean it is out of your line except to the extent that you have gone down there and made an inspection for this purpose?

Mr. Ryder: I object to the question. A lay witness may make an inspection of a physical location just as he could testify to the fact that somebody was on the corner of Fourth and Pennsylvania Avenue last night at 8:00 o'clock.

Exam. Carter: I don't think Mr. Smith will press his question.

By Mr. Smith:

Q. Well now, let's take the tracks on the west side of that group of buildings, namely, the tracks that run alongside Buildings 103 and 117. Will you tell me, please, the capacity of that track in cars?

A. As to the west side of those buildings, I can't get those numbers that you refer to; it is marked Warehouse 14,
[fol. 1014] Warehouse *Warehouse* 8 and Warehouse 9—that is the west side of that building there.

Q. Well, let's refer to those numbers that you just mentioned. On your Exhibit No. 20, however, you showed somewhat different numbers, but my only interest is to identify to you the ones I am talking about. Just state the car capacity of that track running alongside the buildings that you have referred to.

A. Nine cars.

Q. So that this group of buildings has a trackage capacity on its east and west side of 15 cars?

A. Yes, sir.

Q. And does what you said about the platforms and the physical layout with respect to the east side apply equally with respect to the west side?

A. The west side is situated the same as the east; it is fixed to unload carloads of refrigerator traffic, dressed meat, carcass, hogs, and things like that, into coolers. There is no place to unload live hogs.

Q. In that group of buildings?

A. Not at either of the two tracks we mentioned; there is no place they could handle live hogs, no, sir.

Q. As I understand it, the car door would be some short distance from the platform, exactly what distance you do not know, and then there is an 8 or 10 foot platform that [fol. 1015] must be traversed before reaching the doors of the buildings, is that right?

A. That is right.

Q. And what, if you know, would be necessary in order to conduct live stock from the car door into the building?

A. We would have to change the entire operation of the building because directly off the platform would be cooler space, storage spaces, the tierces are in there, bacon is stored, hams, and things of that nature.

Q. You would have to make some provision for conducting these animals to the pens which exist now inside the buildings?

A. Practically have to rearrange the building.

Q. And, answering my question a little more directly, will you state what, if any, facilities would be necessary to conduct live stock from the door of the car through the door of the building?

A. I would answer it this way, that as a practical matter it is impossible.

Q. Well, would you care to state what would be necessary in the way of facilities, physical facilities, to conduct the animals from the door of the car into the building? That is the third time I have asked it; maybe you will answer it this time.

A. I would like to answer it but, as I say, I have inspected [fol. 1016] the building and gone through all those departments, and it isn't just a casual inspection, Mr. Smith, because I used to deliver messages in every department over there.

Q. That is all very interesting, but will you either just answer my question or say that you don't want——

Mr. Rynder (Interposing): Don't pay any attention to counsel's improper suggestions as to how you are answer-

ing, or anything of that kind; if you think you have answered the question, let it go.

By Mr. Smith:

Q. Do you think you have answered the question?

A. I think my answer to the effect that I think it is practically impossible to do it, would be the best answer to the question.

Exam. Carter: I didn't hear that answer.

The Witness: I say that my answer to the effect that it is practically impossible to do it is the best answer. I can't conceive of such a thing being done. I mean business men wouldn't attempt to change a building that was built to slaughter hogs in and store products in to put live stock in.

Exam. Carter: I don't think you understood the question. I think Mr. Smith's question was, what facilities would be necessary to erect or have erected on the platform leading from the car door to the door of the warehouses to make it possible for live stock to move from the car door over the platform into the warehouse.

[fol. 1017] Is that your question, Mr. Smith?

Mr. Smith: Yes, that is the question.

The Witness: Well, if they wanted to unload live stock they would have to stop unloading other freight; they couldn't use the same platform to unload livestock as they use to unload dressed meats and to ship out provisions; couldn't have them in and going out the same place.

Mr. Smith: The witness just refuses to answer the question, Mr. Examiner.

By Mr. Smith:

Q. As a matter of fact, you do bring thousands of hogs into this very group of buildings, don't you?

A. Not at either place that you mentioned.

Q. No, but you do bring them into the building, don't you?

A. That is right.

Q. Now, whenever you unload a car from these tracks which have a capacity of 15 cars, you do put something down, or do you know, to connect the platform with the floor of the car?

A. Are you speaking of refrigerator cars?

Q. Any kind of a car that is unloaded there.

A. Yes, we just drop a runway there.

Q. Exactly. Now, will you refer to the track which runs north and south on the west side of the group of buildings, the most westerly of which are numbered on Exhibit 20 as Nos. 29, 68 and 10.

[fol. 1018] Mr. Rynder: I haven't Exhibit 20 with me, Mr. Examiner, and the witness hasn't it. I didn't anticipate that we would be called on, in view of this exhibit, to refer to it.

Exam. Carter: Would you care to have the docket?

Mr. Smith: I have a copy of Exhibit 20 here, Mr. Examiner.

By Mr. Smith:

Q. Are you familiar with the property known as the North House?

A. Yes, sir.

Q. Now, there are tracks along the west side of North House, are there not?

A. Yes, sir.

Q. And are not the most westerly buildings in that group No. 29, 68, 60 and 10?

A. On this new exhibit the North House is numbered 15 and 16.

Q. Let me direct your attention to that group of buildings which is bounded by Exchange Avenue, Packers Avenue, Stock Yard and Loomis Street—have you got it?

A. Yes, sir.

Q. There are tracks running along the west side of that building, are there not?

A. Yes, sir.

Q. And what is the capacity of those tracks in cars?

[fol. 1019] A. On the west side of that building?

Q. That group of buildings.

A. The west track of that building which is known as the East House has a capacity of 7 cars; the north track—there are two tracks north of East House, one called the outside track, which is used for loading only, and has a capacity of 10 cars, and on the same side of the house is what is known as the inside track; we have a track with a capacity of 8 cars. That is the only track serving that group of buildings.

Q. Is the physical set-up, with reference to those tracks about what you have already explained with reference to these other buildings, that there is an unloading platform between the track and the building of 8 or 10 feet in width, with a car floor, when the car is placed at the unloading platform a short distance away from the platform?

A. That is right.

Q. What is this group of buildings used for?

A. The main use is for killing—the East Beef House Killing—that is what that is known as in the Yard. They also have coolers surrounding——

Q. (Interposing:) You have some rather extensive live stock pens in that building, do you not?

A. Yes, sir.

Q. Do you happen to know the capacity of those pens?

A. I do not.

[fol. 1020] Q. You have pens there for both cattle and hogs, do you not?

A. No, sir. There are no hogs killed in that building.

Q. I didn't ask you whether there are any hogs killed there. I asked if you didn't have in House No. 69 floors on which there is storage space for hogs?

A. To my knowledge, there has never been any hogs stored in East Beef House in twenty years.

Q. What is the capacity of those pens?

A. I do not know.

Q. How many floors do they occupy?

A. I don't know.

Q. Well, you have been in that building?

A. Yes, sir.

Q. Can you give the Examiner some understanding approximately the area of those pens, so that he would have some understanding of whether that capacity perhaps was 10 cattle or two thousand?

A. Well, I would [illegible]at the latter figure was closre to it than the first.

Q. And you say those are cattle pens?

A. They are labeled "Cattle Pens", but I know they also hold sheep and calves, but no hogs.

Q. And you kill the cattle in that building?

A. Yes, sir.

[fol. 1021] Q. Now, do you show on this map the car capacity of these tracks which run along these Swift buildings?

A. I don't believe it is shown on the map, no, sir.

Q. Did you state that in your testimony?

A. I gave the number of car capacity in answer to your question, yes, sir.

Q. Did you in your direct testimony state what the total capacity of these tracks are?

A. No, sir.

Q. What is it?

A. For the entire plant?

Q. Yes.

A. I will have to add them up here; I have it by buildings.

Q. Did you state it in the record by buildings?

A. No, in my direct I didn't say——

Q. Well, add it up and tell us what it is.

A. One hundred sixty-five.

Q. How did you arrive at that? Did you put down the tracks that serve certain buildings and give their car capacity?

A. Yes, sir.

Q. State it into the record please.

A. Tracks serving Swift plant have a capacity of 165 cars, and this is determined by taking the track capacity of all the various buildings throughout the entire Swift plant.

Q. Just break that down, please, and show that figure for [fol. 1022] the tracks opposite these various buildings.

A. Starting with No. 7 House, which is at the eastern end of the Swift plant, served by track on the east side in the capacity of 6 cars.

The next building going west is No. 14 House, and is served by track on the west side having a capacity of 9 cars.

Directly west of 14 House across four sets of tracks is 33 House, and the track on the east side of this has a capacity of 5 cars.

Across Exchange Avenue to the north is the employees' garage, and at the rear of this building is a spur track for unloading gasoline that has a capacity of 2 cars.

The next building west of 33 House is 31 House, which has a track capacity of 4 cars.

The next building west of 31 House is the East Beef House, served on the north by two sets of tracks, one holding 10 cars and the other 8, and on the west side of this building there is another track which has a capacity of 7 cars.

Across the C. J. tracks west of the East Beef House is Building No. 6, which has a two-car capacity on each side of the building.

West of the East Beef House and north of C. J. tracks there is the Butterine Factory and Neutral Lard Building, two buildings with a capacity of 7 cars on the south side of the building.

[fol. 1023] Directly opposite these two buildings, south of the C. J. tracks, known as No. 1 Hog House, this building has a capacity of three cars.

Directly west of No. 1 Hog House is Warehouse 27, served by a track in the capacity of 2 cars.

West on the south side of C. J. tracks is the Lard Refinery, this has a capacity of three cars on the outside and seven cars on the inside track.

North of the Refinery, across the C. J. tracks is Warehouse 15, and has a track of 7 car capacity.

West of the Lard Refinery is No. 5 House, has a soap factory that is served by a track with a capacity of seven cars. The soap factory is also served by west tract with a capacity of four cars going north and south.

On the west side of the soap factory is a power plant which is served by a track having a capacity of four cars on the east side of the building.

South of the soap factory is the power plant that has a capacity of two cars for loading cinders.

Continuing south across 42nd Street, the glue house has a track on the east side of the building, no platform; they load through the doors of the house and they have a four car capacity.

On the south side of the glue house is a track with a two car capacity.

[fol. 1024] Directly west of the glue house is the wool house which also has a two car capacity track on the south side of the building.

North between the bone house and the wool house are two sets of tracks serving the wool house and the glue factory and has 8 capacity—I mean each track has a capacity of eight cars.

Continuing north across 42nd Street is the West Oil House with a track of the capacity of four cars; and there is another track which is known as the West House, West, that has another four car capacity.

Continuing north across the C. J. tracks, the Illinois Cold Storage on the west side is served by a track with a five car capacity, and the same building on the east has a seven car capacity.

Going east on 41st Street to the North Oil House, this building is served on the east side by a track with a capacity of five cars.

North of the North Oil House and the west side of the North Beef House is a track with a capacity of four cars, and on the north side of the North Beef House is a track with a capacity of 11 cars.

And then across the street is a track known as the Rubbish Track, and that has a capacity of four cars.

[fol. 1025] Q. And that makes up your total, does it?

A. I hope so.

Q. If your addition is correct?

A. That is right.

Q. Now, does that include then the capacity of all tracks serving Swift Company in this Stock Yards area?

A. Yes, sir.

Q. Including the Hammond House?

A. Oh, no. This is just the Swift plant.

Q. Why didn't you include the Hammond House?

A. Well, we usually refer to Hammond as a separate plant.

Q. You do?

A. Yes, sir.

Q. What about the Libbey Building? You haven't included that in either program.

A. Well, it is a separate company entirely; Libbey is a separate corporation entirely.

Q. What about Hammond?

A. That is in a different category.

Q. Well, what do you mean?

A. Well, when I say "Swift plant" I just refer to this group of buildings in this group. Now, Hammond is several blocks away up at the other end of the yard.

Q. You just didn't put Hammond on this blueprint?

A. No, that is right.

[fol. 1026] Q. But Hammond is shown on Exhibit 20, isn't it?

A. Yes, it is.

Q. What is the capacity of the tracks at the Hammond House?

A. I do not have a detailed description of their track capacity.

Q. Have you been down there?

A. Yes, sir.

Q. Are you familiar with that layout?

A. Yes, sir.

Q. Perhaps you can tell us approximately what the capacity of the tracks are there.

Mr. Rynder: Would that be a mere guess, Mr. Barron?

The Witness: It would be; it would have to be because I haven't——

Mr. Rynder: I might say, Mr. Examiner that that was not included in this map because it is entirely cut off from the Swift plant by Stock Yards property, and in asking that this evidence be prepared I didn't ask to obtain any details about the Hammond property which, as I say, is cut off from the Swift property by Stock Yards property. I know that Mr. Talley has been over it——

Mr. Smith (Interposing): But we don't have Mr. Talley here unfortunately.

Mr. Rynder: I beg your pardon. I know that Mr. Barron has walked over it and I have walked over it, but to state the [fol. 1027] number of car capacity when you haven't counted it, would be a mere guess.

By Mr. Smith:

Q. Is the physical layout there at Hammond with reference to the platforms and the tracks, the same as at these other points?

A. Yes, sir.

Q. What is the pen capacity in the Hammond Buildings for live stock?

A. I know they can kill 80 cattle an hour, but I can't tell you what the pen capacity is.

Q. They do have very substantial pen capacity in that plant, don't they?

A. They would have to have, according to that.

Q. These freight charges that you have referred to, can you give us some idea how they compare with the switching charge which was involved in the Hy-grade case and held applicable by the Interstate Commerce Commission?

A. I believe the switching charge that I just referred to would be the same to the Hy-grade Company as to Swift.

Q. You think it would?

Mr. Rynder: Wait a minute and get this straight. Mr. Smith didn't ask you that. I think that answer is right, that if there is anything that would move to Hy-grade now, it would take the same switching rate; but I understood him to ask you what the switching charge was to the Hy-grade [fol. 1028] Company at the time of the Hy-Grade case, which is a different question.

By Mr. Smith:

Q. Do you want to make a different answer?

A. Well, I don't know what the switching charge was to the Hy-grade Company at the time of the Hy-grade case.

Q. How recently have you unloaded live stock at the Hammond House?

A. To my knowledge there was some live stock unloaded at the Hammond House at the time of the Stock Handlers' Strike.

Q. When was that?

A. I believe it was last November, 1938.

Q. How did you handle those animals with reference to freight rate, did you pay the ssitching charge that you have been discussing?

A. Yes, sir.

Q. And the cars were moved right down on the industry tracks to the Hammond House and unloaded there?

A. There was a temporary platform put up at the time of the Stock Handlers' Strike which allowed them to unload about three cars of stock across the platform; there were no pens or chutes; they would back the truck up to one end of the platform, and then they had to truck the stock around. They found that the set-up was impractical, and I understand that they haven't made use of it except at the time they couldn't get any stock through the yard.

[fol. 1029] Q. How many cars did you unload there at that time?

A. I don't know the number.

Q. Approximately?

A. Well, it was only a matter of a few days, probably a week, because——

Q. (Interposing:) I didn't ask you how many days it was. I asked you how much they unloaded.

A. Well, I was just trying to——

Q. (Interposing:) Recall? All right.

A. No, I wouldn't be able to tell you that. What I meant, was to give you an idea as to the amount of stock that went over it, which I would say over a period of a week or so; I don't know the number of cars.

Q. Now, you say they fixed it up to unload three cars at a time. In order to know how many cars they could have unloaded at the time, you would have to know the car capacity of that track, I suppose, which you say you don't know, is that right?

A. I know the capacity of the place they used to unload live stock, yes, sir.

Q. What is the capacity of the entire track there at the Hammond plant?

A. I don't know.

Q. You don't know that?

A. No.

[fol. 1030] Q. So you don't know how many cars they unloaded at that time?

A. The total number?

Q. Yes.

A. No.

Q. Do you know the daily number?

A. No, sir.

Q. You do know that they made some provision on these platforms for conducting the stock from the car door into the building, don't you?

A. No, they didn't. They couldn't use a platform that we have been referring to as a platform to go in and out of these buildings. They built a temporary platform with a width of about five feet, on which they unloaded stock from the car on this platform and drove it across into a truck. They could only unload three cars at a time, and that necessitated in guiding this truck almost entirely around the Hammond plant.

Q. Will you indicate why they could only unload three at a time, please?

A. Because the facilities were only available to unload three at a time, the space they had, and the platform.

Q. If that track and that platform has a capacity of over 30 cars, do you know of any reason why they couldn't have set 30 cars in there if they had wanted it to be a permanent rather than a temporary arrangement?

[fol. 1031] A. The same reason I answered before.

Mr. Rynder: Just wait a minute. Counsel is suggesting something that you may not have caught. He says "if that plant and if that platform had a capacity of 30 cars."

The Witness: I answered that the platform had a capacity of only three cars.

By Mr. Smith:

Q. You mean the platform where they actually set these three cars?

A. That is right.

Q. Now, you said that the platforms and the physical lay-out of the tracks were the same at Hammond as at these other points, didn't you?

A. When I said that I referred to the platforms that go into the buildings of the plant.

Q. Yes. Now, just what did they do on these platforms that they did use for unloading these animals? They put up little fences to conduct the animals from the car door across the platform, did they not?

A. That is right.

Q. What is done with the live stock that is brought over from the Omaha plant?

A. Well, I——

Mr. Rynder: Just a moment.

The Witness: Beg pardon.

By Mr. Smith:

Q. Can you answer the question?

[fol. 1032] Mr. Rynder: To where? I object to that question.

Exam. Carter: Would you clarify it, Mr. Smith. He wants to know to what point it is brought.

Is that it?

Mr. Smith: Brought over to the Swift plant for slaughter.

The Witness: It is trucked over to a set of pens that are built directly opposite to what is known as our North Beef House, and unloaded.

By Mr. Smith:

Q. What are the numbers of those buildings?

A. Warehouse No. 16 fronts on Packers Avenue to the east, and the fire station, which is shown on the map, is

directly north of these pens, where the Omaha trucks stop with stock.

Q. Will you point that out, please, on your new map?

A. Do you want me to repeat that, do you mean?

Q. No.

A. This fire station is north of the pens to which the stock trucked from the Omaha Packing Company is brought.

Q. And then what is done with it?

A. It is unloaded by trucks, they run the trucks into a set of holding pens and they are driven back here to where they connect with the overhead drive up to the roof of North House.

Q. And what is the number of North House?

A. Warehouse No. 16 on this Exhibit 92.

[fol. 1033] Q. Can you locate 16 for me on this No. 20?

A. (No response.)

Q. Now, is all the live stock which Swift brings over from the Omaha plant for slaughter brought ultimately into 16?

A. No, some of it is brought—hogs are brought over to what we call 7 House, and it really includes 7, 21 and 9 Houses—that is the building over on Racine Avenue.

Q. Well, which species are brought to 16?

A. Cattle and sheep and calves.

Q. And the hogs are brought into this group of buildings bounded by Stock Drive, Cook Street and Racine Avenue, the group of buildings which you said had a car capacity of about 15 cars?

A. Yes, sir.

Mr. Rynder: Will you identify those on Exhibit 92?

The Witness: That is the building that is labeled Warehouse 7, Warehouse 21, Warehouse 9, and it faces Racine Avenue to the East, Exchange Avenue on the north; and it doesn't have any other labels on it; the tracks are at the west end of the building. I think Cooke Street is the name given the street where the tracks are on the west side of Warehouse 14.

By Mr. Smith:

Q. Well, Mr. Barron, if you conducted your hogs from these tracks which have a 15 car capacity which are adjacent [fol. 1034] to these buildings into which the Omaha hogs are placed, you would have the hogs in the same place into which all the Omaha hogs are now conducted?

A. But in entirely different side of the building.

Q. Well, as a matter of fact, those tracks run along two sides of that building, don't they?

A. And the hogs come in the third side.

Q. Yes. You would get it right in the same area, wouldn't you?

A. Oh, yes, within the same area.

Q. And then, referring over to this other group of buildings, the second block west, it is into that building that you now move cattle that are received at the Union Stock Yards, isn't it?

A. We move cattle into both the East Beef House, which is Warehouse 51, and to that Warehouse 16, North House; we kill at both places—cattle.

Q. Well, for the purposes of identification, you do take much of your live stock, much of your cattle, that arrives at the Union Stock Yards into this group of buildings that is bounded by Stock Yard, Packers Avenue, Loomis Street and Exchange Avenue?

A. That is right.

Q. And you have a substantial track capacity running alongside the west boundary of that group of buildings? You have testified to that, have you not?

[fol. 1035] A. Yes, sir.

Q. So that if you made provision to conduct the animals from the floor of the car on that track into that building, the animals would arrive at the same area in which they now arrive, having been received at the Union Stock Yards & Transit Company, isn't that so?

A. If that provision could be made, yes.

Mr. Smith: I think that is all.

Exam. Carter: Any further questions, Mr. Rynder?

Redirect examination.

By Mr. Rynder:

Q. Do any of these unloading platforms that Mr. Smith has referred to, now have chutes, pens, or other facilities for unloading live stock?

A. No, sir.

Q. Mr. Smith first referred, I think, to Houses 9 and 21, where live stock is taken to the upper floor, whatever that may be, for slaughter. Is the entrance into which that live

stock is taken to reach the slaughtering floor, or holding for slaughtering flooro served by railroad tracks?

A. No, sir.

Q. I think Mr. Smith next referred to Buildings 103 and 117. What is inside those buildings, do you recall?

A. I will have to ask to look at that other map, because this doesn't have those numbers on it.

[fol. 1036] Are you sure about those numbers? I don't find them.

Q. Maybe I am wrong about it, but that is the note I made.

A. Oh, wait a minute, I have found them now. 103 is the building that corresponds to Warehouse 14 on this large map, the latest exhibit; and 117 is the building directly north of 103 along the tracks between Warehouse 33 and Warehouse 14 on the large map.

Q. Have those buildings any facilities by way of chutes or pens for unloading live stock at the present time?

A. No, sir.

Q. If some facilities were erected there, would the entrance of live stock interfere with manufacturing operations?

A. Yes, sir.

Q. And would that also be true as to Houses 9 and 21?

A. Yes, sir.

Q. Would the animals have to go through——

A. (Interposing:) Those are freezer floors where they come in; they would have to change that. That is all refrigerator building right inside there, they are store products and cut products.

Q. Filled up with [illegible] generally?

A. The tierce is on the west side of the building.

Q. Now, likewise as to the North House that you were talking about where cattle are taken to the upper floor or floors for slaughter, are they taken in through any entrance [fol. 1037] from the railroad tracks that serve that plant?

A. No, sir.

Q. Is the entrance for the live stock on the ground at another point?

A. They are driven up from the ground over an overhead runway to the top of the building.

Q. And are the railroad tracks there supplied with any pens or chutes for unloading of live stock?

A. No, sir.

Q. Now, you were asked about an emergency structure that was put up in the Hammond plant during the period of the Stock Yard Strike last fall. What are the facts as to whether or not that Hammond plant and its property are in any way connected with the Swift plant shown on Exhibit 92?

A. Well, the Hammond plant is south of 45th Street and east of Racine Avenue, and the Stock Yard property extends to the western side of Racine Avenue, so that it is a physical impossibility to get from the Hammond plant to the Swift plant without crossing Stock Yard property.

Q. And if you omit Racine Avenue, which is the Stock Yard's property, and consider the property east of Racine Avenue and north of the Hammond plant, what is upon it?

A. Pens, Stock Yard property.

Q. Pens of the Stock Yards?

A. Company.

[fol. 1038] Q. Have you had any experience to indicate to you whether the Stock Yards would permit you to move live stock from the Hammond plant north to the Swift plant without payment of yardage for crossing its property?

A. Yes, I have.

Q. And what has that been?

A. Some time ago—I can't quote the date—there was a shipment of hogs, or several, that were trucked into the Hammond plant from the Omaha Packing Company, and the Stock Yard Company——

Q. (Interposing:) And over what street did they truck them?

A. They had to come down Racine Avenue and turn in to the Hammond plant at 45th Street. And the Stock Yard Company billed the Hammond Company for yardage charges for using their driveway.

Q. For using Racine Avenue?

A. Yes.

Q. And after that experience was the practice stopped?

A. Yes, sir, immediately.

Exam. Carter: What operations are carried on in the Hammond plant?

The Witness: The principal operation today is storage; they do some killing, but no hog killing.

Exam. Carter: Storage of what?

[fol. 1039] The Witness: Lard.

Exam. Carter: Not of any live animals? Storage of live animals?

The Witness: We don't store animals any place except just waiting to be killed in any of the buildings.

Exam. Carter: Do you store any live animals at the Hammond place at all?

The Witness: No, sir.

Exam. Carter: I mean even waiting to be killed?

The Witness: Well, the Hammond plant has some pens on the north of their building which I understand are leased from the Stock Yard Company, and they hold animals, for instance, to await the killings on the killing floor; but not any more than that. Usually, that is a continuous operation.

Exam. Carter: Killing floor in that plant, is that right?

The Witness: Hammond plant, yes, sir.

Exam. Carter: Live animals are not stored in the Hammond plant and then moved to another of Swift's affiliated plants in that area?

The Witness: No, sir. They couldn't be without going out over the Stock Yard property again.

Cross-examination.

By Mr. Smith:

Q. What yardage charges did you pay the Yards for that? [fol. 1040] A. I understand the bill was referred to our Law Department because of it being an unusual charge. I don't know what the ultimate disposition of it was; I think it was—I think the bill was refused, but I don't know what the ultimate disposition was.

Q. What was the basis of the charge?

A. I believe the charges were on the basis of the number of head of hogs, but I don't know.

Q. Was it based on the tariff filed by the Secretary of Agriculture for the Stock Yards?

Mr. Rynder: Well, if you want the facts on that, why don't you come to me.

Mr. Smith: I want them from the witness; he is the one that is testifying about it.

Mr. Rynder: Well, he only testified that they had a bill; from there on it went to the Law Department. He testified that they had a bill, and that thereafter they stopped trying to send any hogs in Racine Avenue.

By Mr. Smith:

Q. Was it billed as a yardage charge?

A. Yes, sir.

Q. What did you do with those animals that you unloaded at the Hammond plant during the strike?

A. Killed them there.

Q. These storage pens that you speak of, I think you said you didn't know their capacity—I am referring to the stor-
[fol. 1041] age pens within the Hammond plant—am I right in that you said you didn't know what that capacity was?

A. That is right; I don't know.

Q. Might it be as much as several thousand head?

A. I don't know.

Q. During the strike all the animals that you received and slaughtered, you received and slaughtered right there at the Hammond plant, did you not?

A. No, sir. We received and slaughtered some animals at Swift.

Q. How many cars?

A. Well, kept killing them all the time because we bought stock and trucked it right into Omaha Packing Company and trucked it down and——

Q. That means was open to you, was it?

A. Sure. That only effected the Chicago stock.

Q. I see. Why didn't you bring the stock into the Hammond plant and slaughter it?

A. Well, Hammond has a killing game that they wanted to keep going, too.

Q. So they kill there now regularly, do they?

A. I can't say how regularly, but I know that they kill there.

Q. Well, if they had a game they wanted to keep busy, and they brought them in there for that reason they must
[fol. 1042] be killing there regularly, aren't they?

A. Yes, sir, but I know how——

Q. (Interposing:) I thought you just told the Examiner they didn't kill there.

A. I said they didn't kill hogs.

Q. But they are killing cattle there regularly, are they?

A. Yes, sir.

Q. And are you telling us that the animals brought into the Hammond plant during the strike and unloaded there

was just the quota that Hammond customarily kills, or was it some additional stock?

A. Hammond customarily gets their stock right from the Stock Yards' pens, given over to them there, and when the Stock Handlers strike came along they couldn't kill any cattle if they got them outside.

Q. How many cars do they kill a day over there?

A. I don't know.

Q. Do they kill as many as 20 cars a day?

A. My opinion would be that they don't kill that many.

Mr. Smith: That is all.

Exam. Carter: Is the stock that is killed at the Hammon plant ordinarily the market stock, the stock on the market?

The Witness: Yes, sir.

Mr. Rynder: Mr. Examiner, I am not going back again. My redirect was interrupted by Mr. Smith.

[fol. 1043] Exam. Carter: Well, I interrupted you, Mr. Rynder, and I guess Mr. Smith thought that you were through.

Mr. Rynder: No.

Redirect examination (cont'd).

By Mr. Rynder:

Q. Now, you were asked about some unloading pens where live stock is brought from the Omaha plant and then taken to killing floors of the Swift plant. Is that unloading facility constructed for trucks only?

A. Yes, sir.

Q. Does any railroad track serve it?

A. No, sir.

Mr. Smith: Will you read the last question and answer, please? I didn't catch that.

(The question and answer were so read.)

Mr. Smith: I move to have that stricken on the ground that it is not at all informative, and as a matter of fact quite confusing as to what buildings are being discussed, the witness having already said that there are tracks adjacent to these buildings into which this stock is placed when it comes from the Omaha plant. If this is intended to be contradiction there, it ought to indicate——

Mr. Rynder (Interposing): No, this is not in the least contradictory of that, not the least.

[fol. 1044] By Mr. Rynder:

Q. I am referring to the facility; will you please identify it, if you can, at which the live stock is unloaded that is trucked in from the Omaha plant? Can you identify that facility?

A. Yes, sir. That facility is located on the east side of Packers Avenue, south of the fire station and opposite Warehouse 16 in this large group here.

Q. Has it any number designation on it so that Mr. Smith won't be confused?

A. There is nothing to indicate a facility exists there because it was built subsequent to the——

Q. (Interposing:) Well then, referring to that facility that you have just described, is there any railroad track that is adjacent to or from which live stock could be unloaded into that particular facility?

A. No, sir.

Q. Would it involve a drive from some other place to reach it?

A. Yes, sir.

Q. In other words, that facility is not built adjacent to a railroad track?

A. No, sir.

Mr. Rynder: I think I have no further questions.

[fol. 1045] Mr. Smith: I want to ask a question about this, because I want it to be clear to the Examiner.

Recross-examination (Cont'd).

By Mr. Smith:

Q. This facility that you have last been speaking of, in reply to these questions, is the point at which the live stock is first unloaded that comes from the Omaha plant, but it then is taken over to these other buildings which are served by railroad tracks, and it was about those buildings that you and I had some discussion, was it not?

A. Yes, sir.

Q. In other words, the facility at which they are first unloaded when they come over from the Omaha plant is

not the ultimate destination for killing purposes, but the ultimate destination is these other buildings which do have these rail facilities that you have discussed, is that not so?

A. They are driven to a building that has rail facilities.

Q. Now, as I understood your testimony at the last hearing, it was that Swift is receiving, or was then receiving, all of its live stock at its—all of its direct shipments—at the Omaha plant. Is that still so?

A. To my knowledge, that is still the situation, yes, sir.

Q. So that whatever shipments are normally slaughtered at Hammond are not direct shipments of live stock?

[fol. 1046] A. That is so.

Q. But these that were brought in during the strike and unloaded there on the switching rail were direct shipments, were they not?

A. I believe so, yes.

Mr. Smith: That is all.

Further redirect examination.

By Mr. Rynder:

Q. I would like to refer to the same ultimate destinations that Mr. Smith mentioned, if that is a sufficient description.

Do the live stock reach their destinations on the killing floor by going through any of the platforms, of the rail unloading or loading platforms?

A. They do not. They go up to the top of the building via an overhead viaduct, driven; and it is in no way connected to these platforms from which the refrigerator cars and box cars are loaded or unloaded.

Q. And are those incline runways that take the animals to the top of the building adjacent to or served by any railroad tracks?

A. No, they are not.

Q. Mr. Barron, do you happen to know whether that temporary emergency arrangement during the strike at [fol. 1047] the Hammond plant was made by and with the consent of the Stock Yards Company because of the emergency condition?

A. I don't know that it was made by and with the consent of the Stock Yards Company.

Mr. Rynder: I believe that is all.

Exam. Carter: Any other testimony?

(No response.)

Exam. Carter: The hearing is closed.

(Whereupon, at 11:15 a. m., 6/20/39 the above-mentioned hearing was concluded.)

[fol. 1048] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed September 9, 1941

Now come petitioners (appellants) in the above entitled cause, by Edgar B. Kixmiller, Ross Dean Rynder, and Paul E. Blanchard, their solicitors, and file this statement of the points upon which petitioners (appellants) intend to rely and of the parts of the record which they deem necessary for the consideration thereof, together with proof of service thereof upon the defendants (appellees).

[fol. 1049] STATEMENT OF POINTS TO BE RELIED UPON BY PETITIONERS (Appellants)

1. The District Court erred in failing to find that section 15 (5) of the *Interstate Commerce Act* did not supersede or modify the provisions of section 1 (3) of said act with respect to the delivery of live stock at public stock yards; that the legislative history of section 15 (5) of the *Interstate Commerce Act* does not support the conclusion of the Commission to the effect that section 15 (5) was intended to supersede or modify section 1 (3) of the *Interstate Commerce Act* or the law of the *Covington case* as to unloading and delivery of live stock by railroad common carriers at public stock yards; and that the interstate transportation of live stock to the railroad defendants' station at the Union Stock Yards in Chicago does not end until after unloading for delivery or tender to the consignee at said destination, as specified in assignments of error Nos. 9, 10, 11, and 12.

2. The District Court erred in failing to find that the charges here assailed, in so far as they were assessed for the use of stock yard facilities in effecting delivery of interstate shipments of live stock, were charges for transportation within the meaning of that term as defined in section

1 (3) of the *Interstate Commerce Act;* that the Interstate Commerce Commission has jurisdiction to pass upon the legality and reasonableness of such charges; that, if the present railroad rates to the railroad defendants' station at the Union Stock Yards do not afford compensation to the railroads for egress from the pens to a public street, the Commission may and should prescribe a reasonable additional charge for such egress; and that, if use of the [fol. 1050] terminal facilities of the Union Stock Yards for egress from unloading pens to a public street is a part of transportation and if this use is a service for which reasonable compensation is justified, this charge, like the unloading charge, is a part of the reasonable transportation rate, determination of which is committed to the jurisdiction of the Interstate Commerce Commission, as specified in assignments of error Nos. 13, 14, and 15.

3. The District Court erred in failing to find that section 406 (a) of the *Packers and Stockyards Act, 1921* (U. S. C. A. tit. 7, § 226), reserves to the Interstate Commerce Commission power and jurisdiction over all matters relating to the transportation and delivery of live stock by railroad common carriers, including all services essentially a part of such transportation and delivery; and in failing to find that the Commission erred in holding that the Secretary of Agriculture has asserted or has jurisdiction over, and has fixed charges for, mere egress from railroad unloading pens at public stock yards to a public street for live stock upon which no "yardage service", as defined in the *Packers and Stockyards Act, 1921,* is requested, desired, or received, as specified in assignments of error Nos. 17 and 19.

4. The District Court erred in failing to find that no stock yard services, subject to the *Packers and Stockyards Act, 1921* (U. S. C. A. tit. 7, § 201), are desired or requested by appellants in connection with the delivery of live stock by the railroad defendants at their station at the Union Stock Yards in Chicago, as specified in assignment of error No. 1.

[fol. 1051] 5. The District Court erred in failing to find that the Union Stock Yard and Transit Company is a terminal of the railroad defendants, within section 1 (3) of the *Interstate Commerce Act;* performs their railroad terminal services (as their agent); and files with the Interstate Commerce Commission a tariff naming its charges for terminal

services "as railroad's agent"; that the Union Stock Yards is named in the railroad tariffs as a specific station to which the railroad rates to Chicago are applicable; that the Union Stock Yards at Chicago have become the common live stock depot of the railroad defendants; and that the stock yard company, in supplying its unloading facilities and runways (as agent for the railroads), performs the transportation services which the railroad defendants are under a duty to render, as specified in assignments of error Nos. 5 and 6.

6. The District Court erred in failing to find that the Union Stock Yard and Transit Company functions in a dual capacity: (a) as a public stock yards providing stock yard services, subject to the *Packers and Stockyards Act, 1921;* and (b) as a common carrier by railroad subject to the *Interstate Commerce Act,* in which latter capacity the stock yard company provides (as railroad's agent) terminal facilities for the delivery of live stock, which are a part of the railroad defendants' railroads, under section 1 (3) of the *Interstate Commerce Act,* as specified in assignments of error Nos. 7 and 8.

[fol. 1052] 7. The District Court erred in failing to find that the fact that egress from the railroad defendants' unloading pens to a public street would necessarily be across property of their agent, Union Stock Yard and Transit Company, does not deprive the Commission of authority to make an order against said railroad defendants requiring egress for appellants' shipments, with or without a rate change covering such service, as specified in assignment of error No. 16.

8. The District Court erred in failing to find that the railroad defendants do not provide the delivery of live stock to which appellants are entitled as a matter of law, by placing cars of live stock upon railroad team tracks or appellants' private plant tracks, which are not equipped with unloading facilities, such as chutes, pens, or yards, necessary for the delivery of live stock, as specified in assignments of error Nos. 2, 3, 23, and 24.

9. The District Court erred in failing to find that appellants have an unqualified right to consign their live stock to the Union Stock Yards Station of the railroads at Chicago, rather than to an industrial side track (not equipped

with live stock unloading facilities) which would involve an additional switching charge of $19.50 per car above the railroad defendants' line haul rates to their terminal unloading facilities at the Union Stock Yards; and that, where two stations are so named, one requiring the payment of a freight rate of $19.50 per car higher than the other, appellants are under no obligation to select the station to which the higher rate applies, merely to avoid the consequences [fol. 1053] of the railroad defendants' failure to meet their lawful obligations as to delivery of live stock at the lower rated station, as specified in assignments of error Nos. 4 and 25.

10. The District Court erred in failing to find that appellants cannot be deprived by the railroad defendants of a lawful delivery of live stock at said railroad defendants' live stock station at the Union Stock Yards in Chicago, because live stock may be delivered at the unloading facilities of the Omaha Packing Company at 26th & Halsted Streets (another and different station), approximately three miles from appellants' plants at the Union Stock Yards, and at which the railroad defendants do not maintain their own facilities for unloading live stock; and that appellants have a right to obtain a lawful delivery of their live stock at the facilities provided by the railroad defendants at their Union Stock Yards adjacent to appellants' plants, as specified in assignment of error No. 26.

11. The District Court erred in failing to find that the contract of July 1, 1891 (which expired in 1906) created no tri-party relation between the stock yards, the railroads, and appellants; that the railroad defendants were not parties to said contract; that said contract related solely to stock yard services; that the question of mere egress from railroad unloading pens to a public street was not involved in said contract; that said contract throws no light upon whether section 15 (5) of the *Interstate Commerce Act* amended section 1 (3) of that act or the law of the *Covington case;* that appellants are not estopped to obtain the relief sought in this proceeding by reason of said contract; and that, if the Union Stock Yard and Transit Company [fol. 1054] was ever the agent of appellants for the receipt from the railroads of appellants' shipments of live stock to Chicago, that agency was ended by appellants' notices to the railroad defendants of May 9, 1933, May 16, 1933, and

September 9, 1935, as specified in assignments of error Nos. 20, 21, and 22.

12. The District Court erred in failing to find that the issues in the present case are not the same as those which were before the Interstate Commerce Commission in *Hygrade Food Products Corp v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, which was reviewed by the Supreme Court in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382, as specified in assignment of error No. 18.

13. The District Court erred in adopting as its own certain findings of the Commission and in holding that said findings were sufficient in law and in fact to sustain the order of the Commission, as more fully specified in assignments of error Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42.

14. The District Court erred in finding that the complaint of the appellants herein should be dismissed in failing to issue the permanent injunction prayed for in said complaint, and in entering its final decree herein of June 4, 1941, dismissing the complaint.

[fol. 1055] DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Petitioners (appellants) hereby designate for printing the entire record of the proceedings before the United States District Court, including exhibit "A" which is the transcript of the oral evidence taken before the Interstate Commerce Commission in the hearings in No. 27862, *Swift and Co., et al., v. The Alton R. Co., et al.*, numbered from page 1 to page 1047, inclusive; but petitioners (appellants) do not designate for printing the original exhibits in connection with said hearings before the Interstate Commerce Commission, designated exhibit "B" in the hearing before the United States District Court, and numbered exhibit 1 to exhibit 92, inclusive, in said hearings before the Interstate Commerce Commission, which have been certified to this court separately and not as a part of said transcript of record.

Edgar B. Kixmiller, Ross Dean Rynder, Paul E. Blanchard, Solicitors for petitioners (appellants).

Endorsed on cover: File No. 45,923, N. Illinois, D. C. U. S., Term No. 595. Swift and Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, et al. Filed September 9, 1941. Term No. 595 O. T. 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 595

SWIFT AND COMPANY, ET AL.,
Appellants,

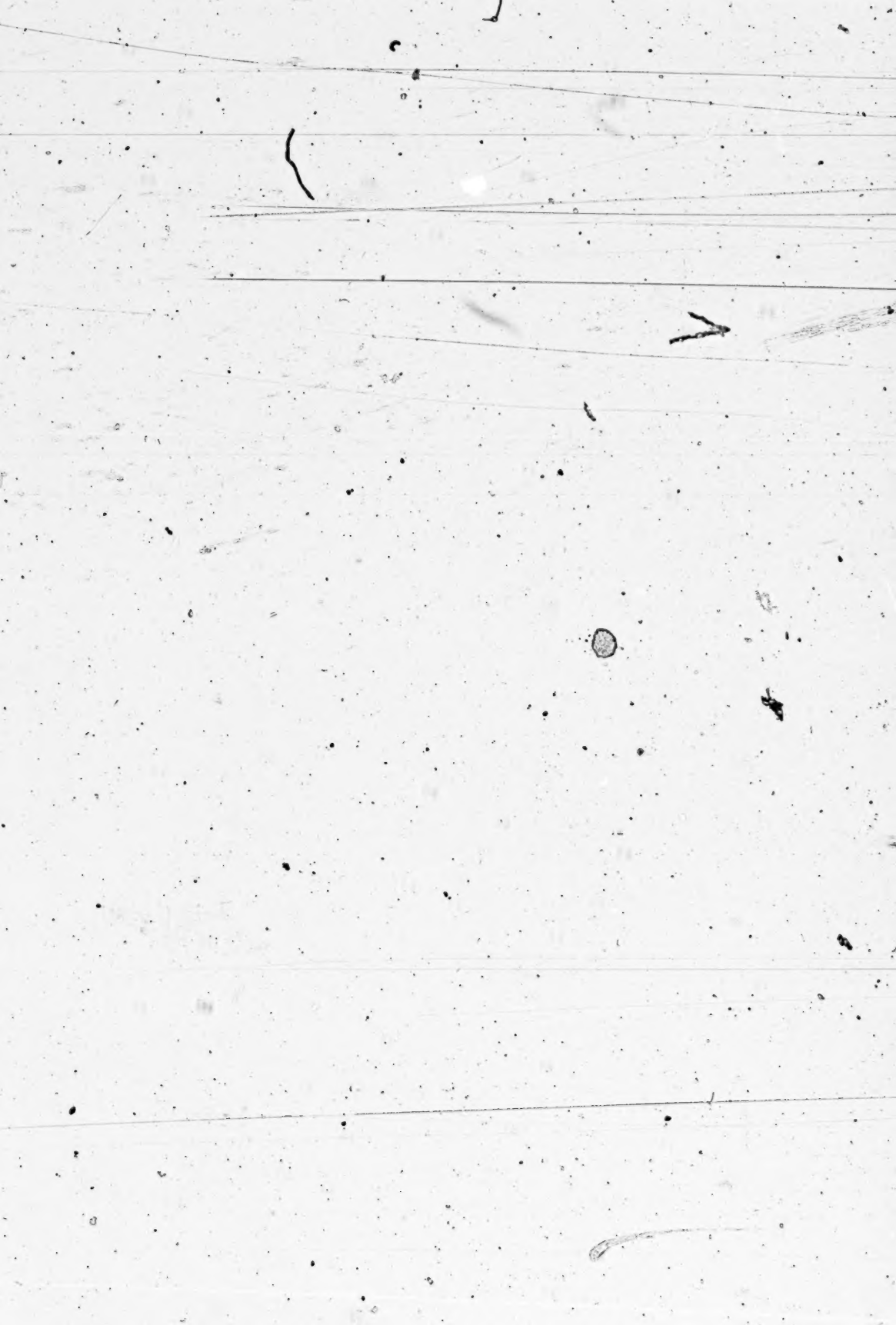
vs.

THE UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,
PAUL E. BLANCHARD,
Counsel for Appellants.



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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF ILLINOIS, NORTHERN DISTRICT

CIVIL ACTION. No. 2188.

SWIFT AND COMPANY AND OMAHA PACKING COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

STATEMENT AS TO JURISDICTION OF UNITED STATES SUPREME COURT ON APPEAL.

In compliance with rule 12 of the revised rules of the Supreme Court of the United States, plaintiffs submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in the above entitled cause:

I.

Statutes Relied Upon to Sustain Jurisdiction.

The pertinent provisions of the Interstate Commerce Act, amended, are as follows:

"Sec. 13. (*As amended June* 18, 1910, *February* 28, 1920, *and August* 9, 1935.) (*U. S. Code, title* 49, *sec.*

1*e*

13.) (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

"Sec. 14. (*Amended March* 2, 1889, *June* 29, 1906, *and February* 28, 1920.) (*U. S. Code, title* 49, *sec.* 14.) (1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

"(2) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

"Sec. 15. (*As amended June* 29, 1906, *June* 18, 1910, *February* 28, 1920, *March* 4, 1927, *June* 19, 1934, *and*

August 9, 1935.) (*U. S. Code, title* 49, *sec.* 15.) (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The pertinent sections of Tit. 28, U. S. C. A. (Judicial Code), relating to review of the Commission's orders, are as follows:

"§ 41, subd. (27). Enforcement of orders of Interstate Commerce Commission. Twenty-seventh. Of all cases for the enforcement of any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, sec. 1, 36 Stat. L. 539; Mar. 3, 1911, c. 231, sec. 207, 36 Stat. L. 1148; Oct. 22, 1913, c. 32, 38 Stat. L. 219.)"

"§ 41, subd. (28). Setting aside order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

"§ 43. Venue of suits relating to orders of Interstate Commerce Commission. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)"

"§ 44. Procedure in certain cases under interstate commerce laws; service of processes of court. The

procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"§ 45. (Judicial Code, section 209.) District courts; practice and procedure in certain cases. The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the

sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

"§ 45a. (Judicial Code, sections 212, 213, amended.) Special attorneys; participation by Interstate Commerce Commission; intervention. The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes; and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party;

and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. (June 18, 1910, c. 309, § 5, 36 Stat. 543; Mar. 3, 1911, c. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149.)"

"§ 47a. (Judicial Code, section 210.) Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

II.

Dates of Decree and Application for Appeal.

The final decree of the three-judge district court of the United States for the Eastern Division of Illinois, Northern District, was entered June 4, 1941. The application for appeal was filed July 10th, 1941, and allowed July 10th, 1941.

III.

Nature of the Case.

This is a suit brought by plaintiffs, Swift and Company and Omaha Packing Company, against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside, and annulling a certain report and order of the Interstate Commerce Commission, known on the records of said commission as No. 27862, *Swift and Co.* v. *Alton R. Co.*, 238 I. C. C. 179. Armour and Company intervened before the Commission and in the District Court.

On or about September 18, 1937, plaintiffs filed with the Interstate Commerce Commission a complaint known upon the records of the Commission as No. 27862, *Swift and Co. et al.* v. *The Alton Railroad Co., et al.*, in which it was alleged in substance that by tariff publication, and by long usage and custom, the railroad defendants had constituted the Union Stock Yards, Chicago, Ill., as their terminal for the receipt and delivery of live stock in Chicago, Ill.; that the railroad defendants denied to plaintiffs, contrary to law and to specific provisions of the Interstate Commerce Act, the right to obtain from said railroad defendants, at reasonably convenient, safe, and suitable pens, ways, and alleys, possession of direct shipments of live stock consigned to plaintiffs at said live stock terminal of the railroad defendants at the Union Stock Yards, Chicago, Ill., and denied to plaintiffs egress for removal of such live stock from the unloading pens of said railroad defendants on the property of the Union Stock Yard and Transit Company of Chicago (the railroad defendants' only live stock terminal in Chicago) to the nearest public street or to the packing plant of plaintiff Swift and Company, via the shortest or most convenient way, to be designated by said

railroad defendants, without the payment to the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, of yardage charges for yardage services not necessary to a delivery of live stock, in excess of and in addition to the lawful published tariff rates of said railroad defendants to their unloading pens upon the property of their agent, The Union Stock Yard and Transit Company of Chicago, said yardage charges being for services not necessary or desired by plaintiffs in order to obtain possession of their live stock, and being for services totally different from a mere delivery of said live stock, and being for stock yard services, such as holding, weighing, etc., none of which stock yard services were or are desired or requested by plaintiffs.

The prayer of the complaint before the Commission was in substance that the railroad defendants and each of them be required to cease and desist from said violations of the Interstate Commerce Act and to establish rules and regulations under which plaintiffs might obtain possession of their direct shipments of live stock from the railroad defendants at the unloading pens of the railroad defendants at the Union Stock Yards in Chicago, Ill., and be permitted egress from said unloading pens of the railroad defendants solely for the purpose of removal of said live stock from said unloading pens of said railroad defendants to the nearest public street, via the shortest or most convenient way, to be designated by the railroad defendants, without payment of yardage charges for yardage services neither desired, requested, nor necessary in connection with the delivery to plaintiffs of live stock by the railroad defendants, and without payment of any other than the lawful transportation charges of the railroad defendants for the transportation of such direct shipments from the origin points thereof to the railroad defendants' unloading pens at the Union Stock Yards in Chicago, as provided in the

tariffs of the railroad defendants filed with the Commission; and plaintiffs sought reparation for damages in the sum of $17,500, plus such amounts as might accrue due to similar violations of plaintiffs' rights by the railroad defendants during the pendency of the proceeding, with interest thereon.

After hearing by the Commission, the Commission entered its order and decision in said proceeding, No. 27862, *Swift and Co.* v. *Alton R. Co.*, 238 I. C. C. 179, in which it held in substance that plaintiffs were not entitled to egress from the railroad defendants' unloading pens at the Union Stock Yards, Chicago, to the nearest public street via the most convenient or direct route, to be designated by railroad defendants, without payment of yardage charges for yardage services (neither desired nor requested by plaintiffs) under the Packers and Stockyards Act, 1921, to railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago.

Thereafter plaintiffs filed with the Commission a petition for reargument, reconsideration, and reversal of the Commission's order. Said petition was denied by the entire Commission by its order of July 8, 1940.

Thereafter, on or about October 7, 1940, plaintiffs filed their complaint herein in the United States District Court, for the Eastern Division of Illinois, Northern District, in which it was alleged that the decision of the Commission should be suspended, enjoined, set aside, and annulled because of alleged errors of law and fact in the Commission's decision. It was in general alleged that the findings of the Commission were unsupported by the evidence of record, contrary to the evidence of record, contrary to the weight of the evidence, arbitrary, confiscatory, and without due process of law; and that the failure of the Commission to decide said case in accordance with the facts of record and the law applicable thereto resulted in the payment by plaintiffs of unlawful rates and charges in order to obtain

possession of their live stock consigned to them at the railroad defendants' live stock terminal at the Union Stock Yards in Chicago, Ill.

On April 21, 1941, the cause came on for final hearing upon the merits before said United States District Court, specially constituted of three judges, as required by the Urgent Deficiencies Act of October 22, 1913 (U. S. C. A. tit. 28, §§ 41(27), 41(28), 43, 44, and 46).

On June 4, 1941, said court entered its final decree in this proceeding, in which it is ordered, adjudged, and decreed that the findings made by the Commission are adequate to support its conclusion that the transportation of direct shipments of live stock to the railroad defendants' live stock terminal at the Union Stock Yards, Chicago, is completed when the live stock is placed in the railroad defendants' unloading pens at the Union Stock Yards, and that yardage charges assessed by the Union Stock Yard and Transit Company for services performed and facilities used beyond the gates leading from the pens in the stock yards, into which the live stock is unloaded from the railroad cars, are not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of live stock transported to their live stock terminal at the Union Stock Yards, Chicago, is not contrary to law and does not result in an unreasonable practice; and that plaintiffs are not entitled to the setting aside or annulling of said order of April 8, 1940, or to a permanent injunction against its enforcement, or to any relief.

IV.

Decisions Relied Upon to Sustain Jurisdiction of Supreme Court on Appeal.

Appeal to the Supreme Court of the United States is provided in § 47a of Title 28 of the United States Code,

quoted herein. The decisions in which the Supreme Court has exercised its appellate jurisdiction in cases coming within the statutory provisions quoted are very numerous. Amongst those of more recent date which may be cited are the following:

United States v. *Berwind-White Coal Min. Co.*, 274 U. S. 564, 71 L. Ed. 1204;

St. Louis & O'Fallon R. Co. v. *United States*, 279 U. S. 461, 73 L. Ed. 798;

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420, 74 L. Ed. 524;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658, 74 L. Ed. 1098;

Beaumont, S. L. & W. R. Co. v. *United States*, 282 U. S. 74, 75 L. Ed. 221;

Florida v. *United States*, 282 U. S. 194, 75 L. Ed. 291;

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 75 L. Ed. 359;

Chicago, R. I. & P. R. Co. v. *United States*, 284 U. S. 80, 76 L. Ed. 177;

Atchison, T. & S. F. R. Co. v. *United States*, 284 U. S. 248, 76 L. Ed. 273;

Texas & P. R. Co. v. *United States*, 289 U. S. 627, 77 L. Ed. 1410;

United States v. *Louisiana*, 290 U. S. 70, 78 L. Ed. 181;

United States v. *Baltimore & O. R. Co.*, 293 U. S. 454, 79 L. Ed. 587;

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. Ed. 1382;

Baltimore & O. R. Co. v. *United States*, 298 U. S. 349, 80 L. Ed. 1209;

United States v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. Ed. 1186;

United States v. *Pan American P. Corp.*, 304 U. S. 156, 82 L. Ed. 1262;

Rochester Telephone Corp. v. *United States*, 307 U. S. 125, 83 L. Ed. 1147;

United States v. *Maher*, 307 U. S. 148, 83 L. Ed. 1162;

Federal Power Com. v. *Pacific Power & Lt. Co.*, 307 U. S. 156, 83 L. Ed. 1180;

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. Ed. 198;

No. 577, *Mitchell* v. *United States*, decided April 28, 1941 (L. Ed. Adv. Ops. 1940-41, vol. 85, no. 13, p. 811).

Respectfully submitted,

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,
Solicitors for Plaintiffs,
Swift and Company,
Omaha Packing Company.

PAUL E. BLANCHARD,
Solicitor for Intervenor,
Armour and Company.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF ILLINOIS, NORTHERN DISTRICT.

Civil Action. No. 2188.

SWIFT AND COMPANY and OMAHA PACKING COMPANY, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Findings of Fact and Conclusions of Law.

Pursuant to the rules of civil procedure, the court makes the following findings of fact and states the following conclusions of law upon the entire record in the above-entitled action.

FINDINGS OF FACT.

1. By complaint filed with the Interstate Commerce Commission on September 20, 1937, against the Alton Railroad Company and other common carriers by railroad, Swift & Company, G. H. Hammond Company and Omaha Packing Company, wholly owned subsidiaries of Swift & Company, alleged that the railroads defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards in Chicago, owned and operated by the Union Stock Yards & Transit Company at Chicago, to the nearest public street, in connection with direct shipments of livestock consigned to complainants, free from any charge other than the line-haul rate, had resulted and results in an unreasonable practice in violation of the Interstate Commerce Act.

2. Complainants Swift & Company and Omaha Packing Company are engaged in the packing house business and operate packing plants for the processing of livestock at

Chicago, Ill., which plants are located adjacent to the Union Stock Yards in Chicago.

3. The complaint was docketed by the Interstate Commerce Commission as No. 27862, *Swift & Company et al. v. Alton Railroad Company et al.*, the defendants being common carriers by railroad engaged in the transportation of livestock to Chicago. The Union Stock Yard & Transit Company was not named as a defendant.

4. In the complaint heretofore referred to, the Commission was asked to require the railroads defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. The Commission was also asked to award reparation to each complainant for the charges paid by reason of the unlawful practice during the period of two years preceding the filing of the complaint and during the pendency of the proceeding.

5. Answers to the complaint were filed by the railroads defendants; Armour and Company was permitted to intervene in support of the complaint, full hearings were held before an examiner of the Commission, briefs were filed, and examiner's proposed report was issued, to which complainants filed exceptions, which exceptions were replied to by defendants, and the proceeding was orally argued before the entire Commission.

6. On April 8, 1940, the Commission issued its report, 238 I. C. C. 179, annexed to and made a part of the bill of complaint as Exhibit B, in which the Commission, among other things, found:

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in the report,

transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

7. The Commission further found that after the livestock arrives at the Union Stock Yards, it proceeds to unloading platforms on the property of and owned by the Yard Company where the car door is opened by employees of the Yard Company and the livestock driven by its employees through chutes into unloading pens adjacent to the unloading platforms. As to the shipments for Swift & Company, if its employees are at the unloading platforms when the animals are placed therein, they are driven by Swift's employees from the unloading pens through the property of the Yard Company to the plant of Swift & Company located outside the stock yards. If Swift's employees are not at the unloading pens, and the volume of livestock necessitates immediate removal of the animals, they are taken from the unloading pens to holding pens by employees of the Yard Company; later they are driven from the holding pens through the Yard Company's property to Swift's plant by Swift's employees. Whether possession is taken at the unloading pens or at the holding pens, Swift is required to pay a yardage charge to the Yard Company on each animal, under authority of a tariff on file with the Secretary of Agriculture.

8. The Commission's report states that it is physically impossible to remove livestock from the unloading pens in the stock yards to complainant's plant or to public streets except by use of the Yard Company's property. It is shown that these yardage charges are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards, which is the largest livestock market in the United States and the only public market for the sale

of livestock in the City of Chicago. These charges, so the Commission found, are compensation for services performed by and the use of facilities of the Yard Company after the stock is placed in unloading pens. For the efficient and orderly handling of the large number of shipments arriving at the stock yards, employees of the Yard Company are the only ones permitted to handle the livestock when it reaches the unloading platform.

9. The Commission further found that for more than seventy years, or during its entire existence, the Union Stock Yards Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises. Most of plaintiff's shipments are now being made to the plant of its subsidiary, the Omaha Packing Company, located about two miles from the Union Stock Yards, and the stock received at the plant of the Omaha Packing Company is transported by motor truck over the streets of Chicago to the Swift plant without the payment of the yardage charge.

10. The Commission further found that for more than seventy years it has been the practice of the Union Stock Yards Company to collect a yardage charge on every animal unloaded from the car at Union Stock Yards, and this practice was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice.

11. The Commission's report also states:

During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company.

12. The report also finds that because of the physical conditions existing in the Union Stock Yards, the railroads could not provide egress from the unloading pens to a public street without use of the property of the Yard Company.

13. The Commission in its report, after reviewing the evidence, found:

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards had ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroad. • • •

14. The Commission's report points out that the line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded, and they have no voice in the nature of the yard services provided or in the manner in which they are performed; they have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services.

15. The Commission also found that under the railroad tariffs, the shippers of livestock have the choice of consigning their shipments to the Union Stock Yards, and having them unloaded there without extra charge, or taking delivery on team tracks at other points in the Chicago district, in which event they unload the cars themselves; "that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there."

16. After reviewing the evidence of record, including the long-standing practices and customs in the industry, the Commission found and held that Section 15(5) of the Interstate Commerce Act could not be construed as

imposing an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable unloading pens to the boundary of the Yard Company's property.

17. The Commission further found that for almost 50 years prior to the decision of the Supreme Court in 1912 holding the Yard Company to be a common carrier, the company had maintained two charges, one for unloading the livestock and a yardage charge imposed upon all animals in addition to the unloading charge. Also that no tariff of the Yard Company on file with the Commission ever included yardage charges.

18. The Commission found that the obligation of the carriers in transporting ordinary livestock in carload lots to public stock yards is to make delivery into pens on the stock yards' property which are suitable to receive the stock in a safe manner; that there is a distinction between transportation to public stock yards generally and transportation to other than public stock yards, and that the carriers' duty with respect to livestock consigned to the Chicago Union Stock Yards ended upon delivery into suitable pens and did not include the removal of the livestock from such pens to a point outside the Stock Yards.

Following this finding the Commission's report states:

> The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15(5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

19. On the same date as that on which its report was issued, namely April 8, 1940, the Commission issued an order dismissing the complaint; whereupon a petition for

reargument and reconsideration was filed by complainants, replied to by railroads defendants, and denied by the Commission on July 8, 1940. This suit was instituted upon complaint filed October 7, 1940, by Swift & Company and Omaha Packing Company, organized and existing under and pursuant to the laws of the States of Illinois and Kentucky, whose principal offices and places of business are in Chicago. The matter covered by the aforesaid order of the Commission, now sought to be set aside, was entered upon the petition of complainants, residents of the Northern District of Illinois, Eastern Division, within the meaning of Section 43 of Title 28 of the U. S. Code, and this court has jurisdiction.

20. Defendant, United States of America, is sued herein pursuant to Sections 43 to 48, Title 28 of the U. S. Code.

21. The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, U. S. Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

22. The Alton Railroad Company and other common carriers by railroad serving the Union Stock Yards intervened as parties defendant, and filed answers to the bill of complaint.

23. Complainants herein prayed, among other things, that upon final hearing this court adjudge, order and decree that said order of the Commission of April 8, 1940, is, and at all times has been, beyond the lawful authority of the Commission, is null and void, and should be perpetually set aside and annulled.

24. The United States of America and the Interstate Commerce Commission filed their respective answers to the complaint. Said answers, in substance, admitted the making of the report and order of the Commission complained of; denied that said order was made without adequate findings and evidence to support it; denied that said order was in any other respect unlawful, and by amended answer al-

leged that the court had no authority, in so far as reparation was sought, to grant the relief prayed. The answers of these defendants, as well as the answer of intervening railroads defendants, alleged that said order of April 8, 1940, was made after full hearing and consideration of all the evidence before the Commission and of all the arguments advanced by the parties, and that it was supported by adequate findings and substantial evidence.

25. On April 21, 1941, the cause came on for final hearing upon the merits before this court, specially-constituted of three judges, as required by the Urgent Deficiencies Act of October 22, 1913. On such hearing there was before the court, and the court considered, the entire record of the evidence before the Commission, including the transcript of testimony taken before the Commission and the exhibits introduced in evidence before the Commission.

CONCLUSIONS OF LAW.

1. The findings made by the Commission are adequate to support its conclusion that the transportation of direct shipments of livestock to the Union Stock Yards at Chicago is completed when the livestock is placed in the unloading pens, and that yardage charges assessed by the Stock Yards Company for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, is not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of livestock transported to the Union Stock Yards did not result in an unreasonable practice.

2. The Commission had evidence before it sufficient to sustain its findings.

3. The order of the Commission dated April 8, 1940, was within the lawful authority of the Commission, was not arbitrary or capricious and does not deprive plaintiffs of their property without due process of law.

4. Plaintiffs are not entitled to the setting aside or annulling of said order of April 8, 1940, or to a permanent injunction against its enforcement, or to any relief.

A decree dismissing the complaint is entered herein.

WILLIAM M. SPARKS,
United States Circuit Judge;
PHILIP L. SULLIVAN,
United States District Judge;
M. L. IGOE,
United States District Judge.

Dated this 4th day of June, 1941. Chicago, Ill.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF ILLINOIS, NORTHERN DISTRICT.

Civil Action. No. 2188.

SWIFT AND COMPANY and OMAHA PACKING COMPANY,
Plaintiffs,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Final Decree.

Filed ———————, 1941.

The above-entitled action having been brought to set aside and annul and to perpetually enjoin the enforcement of an order of the Interstate Commerce Commission, dated April 8, 1940, in Docket No. 27862, *Swift & Company et al. v. Alton Railroad Company et al.*, 238 I. C. C. 179, and the cause, pursuant to 28 U. S. C. A. section 47, having been heard upon final hearing before a court of three judges on April 21, 1941, as in said section provided, the court upon consideration of the complaint

Orders, adjudges and decrees that the complaint should be, and the same is hereby, dismissed.

WILLIAM M. SPARKS,
United States Circuit Judge;
PHILIP L. SULLIVAN,
United States District Judge;
M. L. IGOE,
United States District Judge.

Dated this 4th day of June, 1941. Chicago, Ill.

Office Supreme Court, U. S.
FILED
JAN 29 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS, SWIFT AND COMPANY AND OMAHA PACKING COMPANY.

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,
Counsel for Appellants.

January 21, 1942.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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I. The District Court Erred in Failing to Find That Section 15 (5) of the Interstate Commerce Act Did Not Supersede or Modify the Provisions of Section 1 (3) of Said Act With Respect to the Delivery of Live Stock at Public Stock Yards; That the Legislative History of Section 15 (5) of the Interstate Commerce Act Does Not Support the Conclusion of the Commission to the Effect That Section 15 (5) Was Intended to Supersede or Modify Section 1 (3) of the Interstate Commerce Act or the Law of the Covington Case as to Unloading and Delivery of Live Stock by Railroad Common Carriers at Public Stock Yards; and That the Interstate Transportation of Live Stock to the Railroad Defendants' Station at the Union Stock Yards in Chicago Does Not End Until After Unloading for Delivery or Tender to the Consignee at Said Destination, as Specified in Assignments of Error Nos. 9, 10, 11, and 12 . . 12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS, SWIFT AND COMPANY AND OMAHA PACKING COMPANY.

(NOTE: In the following brief the abbreviation "R. p. __" refers to the pages of the printed transcript of record in this court. The exhibits which were presented in the hearings before the Commission, numbered 1 to 92, inclusive, were certified to this court separately and not as a part of the transcript of record. Throughout this brief they are referred to by the exhibit numbers which they received during the hearings before the Commission. The emphasis throughout the brief, as indicated by italics, is supplied by the writers.)

Opinions.

No opinion was filed by the District Court. That court filed findings of fact and conclusions of law, together with a final decree dismissing the complaint, entered June 4,

1941. The findings of fact, conclusions of law, and decree of the District Court appear at pp. 90-98 of the record.

This litigation was commenced by a complaint filed with the Interstate Commerce Commission (hereinafter called the Commission) on September 20, 1937. The decision of the Commission (dismissing the complaint) appears in the reports of the Commission as No. 27862, *Swift and Co. v. Alton R. Co.*, 238 I. C. C. 179, and is printed at pages 34-57 of the transcript of record in this court.

Appendix to Appellants' Brief.

We present herewith a separate volume entitled "Appendix to Appellants' Brief". This appendix has been prepared in order that the brief itself may be kept within reasonable limits.

In addition to the statutes cited, there are, for convenience, included in the appendix certain decisions of the Commission to which we desire to call attention, abstracts of parts of the record, certain exhibits which have been separately certified, and other matters which may be conveniently presented in the appendix. The appendix is intended as a ready source of verification of statements which may appear in summary form in this brief. It need not be consulted except for that purpose.

The Question to Be Decided.

May appellants lawfully demand the right to take possession of their direct shipments of live stock at the unloading pens of the railroads' only live stock terminal in Chicago and have egress thence immediately to a public street, upon payment to the railroads of their published transportation rates (*or such rates plus a reasonable fee for egress*) without the payment of additional charges, known as yardage charges, assessed by the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, for a complete stock yard service (not a transportation

service) furnished under the provisions of the *Packers and Stockyards Act, 1921*?

The Commission has denied its jurisdiction to decide whether the yardage fee (covering a complete stock yard service) is a reasonable charge for mere egress. (Commission's decision, R. p. 55, second sentence, third paragraph.)

The Egress Sought by Appellants Would Not Impose Any Additional Costs Upon the Railroad Defendants.

The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness to pay whatever the Commission might consider reasonable for egress, in addition to the line haul rate to the unloading pens, if in fact additional expense should be incurred by the railroads by reason of any payment to their agent, the stock yard company, for use of its alleys for a short distance from the railroad unloading pens to public streets, alleys, or ways.

It is true that in the complaint reparation was asked upon past shipments. That question was not decided by the Commission in view of its disclaimer of jurisdiction and is not before the court on this appeal. That would be a matter for the Commission to decide in the event that the case is remanded for further consideration. The Commission has power to establish a reasonable rate, regulation, or practice for the future without awarding reparation for the past. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055.

The Statutes Involved.

The statutes involved are certain sections of part I of the *Interstate Commerce Act*. They appear in full at pages 1-5 of the appendix to this brief.

The statutes establishing the jurisdiction of the District Court and of this court on appeal are Title 28 U. S. C. A.

(Judicial Code) section 41, subdivisions 27 and 28, and sections 43, 44, 45, 45a, 46, 47, 47a, and 48, printed in full at pages 6-12 of the appendix to this brief.

Specification of Assigned Errors Intended to Be Urged.

Appellants intend to urge each of the assigned errors. While they are numerous, in order to permit statement with the particularity required by rule 9, they fall into certain well defined groups as to which the assignments are either as to error of the District Court in failing to make certain findings or error in the findings made. They are combined under our statement of points relied upon (R. p. 787).

Statement of the Case.

This is a suit by appellants, Swift and Company and Omaha Packing Company, against the United States and the Commission for the purpose of suspending, enjoining, setting aside, and annulling certain report and order of the Commission in No. 27862, *Swift and Co.* v. *Alton R. Co.*, 238 I. C. C. 179, which appears at pages 34-57 of the record in this court. Armour and Company intervened before the Commission (but without seeking relief) and in the District Court and has joined in this appeal.

The principal contention is that the Commission and the District Court made fundamental errors in their construction of the law. We have, however, printed the transcript of the evidence before the Commission because in a few instances the Commission has failed to state adequately the facts of record; or has failed to make findings with respect to material facts upon which evidence was introduced.

THE RELIEF SOUGHT.

The prayer is not for a final adjudication of the rights of the parties, but remand of the complaint to the Commission for exercise of the jurisdiction which the Commission

has disclaimed. The relief sought is that indicated by this court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 83 L. ed. 1147, where the court said (at page 136):

> "* * * if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

THE COMPLAINT BEFORE THE COMMISSION.

In September, 1937 appellants filed with the Commission a complaint (R. pp. 24-34), in which it was alleged in substance that by tariff publication, and by long usage and custom, the railroad defendants had constituted the Union Stock Yards, Chicago, Ill., as their terminal for the receipt and delivery of live stock in Chicago; that the railroad defendants denied to appellants, contrary to law and to specific provisions of the *Interstate Commerce Act*, the right to obtain from said railroad defendants, at reasonably convenient, safe, and suitable pens, ways, and alleys, possession of direct shipments of live stock consigned to appellants at said live stock terminal of the railroad defendants at the Union Stock Yards, Chicago; and denied to appellants egress for immediate removal of such live stock from the unloading pens of said railroad defendants, on the property of their agent, The Union Stock Yard and Transit Company of Chicago (the railroad defendants' only live stock terminal in Chicago) *to the nearest public street via the shortest or most convenient way, to be designated by the railroad defendants*, without the payment to the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, of yardage charges for stock yard services not necessary to a delivery of live stock, in excess of and in addition to the lawful published tariff rates of said railroad defendants to their un-

loading pens upon the property of their agent, The Union Stock Yard and Transit Company of Chicago.

The prayer of the complaint was in substance that the Commission require the railroad defendants to establish rules and regulations under which appellants might obtain possession of their direct shipments of live stock from the railroad defendants at their unloading pens at the Union Stock Yards, Chicago, and be permitted immediate egress from said unloading pens of the railroad defendants solely for the purpose of removal of said live stock from said unloading pens of said railroad defendants to the nearest public street, *via the shortest or most convenient way, to be designated by the railroad defendants*, without payment of yardage charges for stock yard services neither desired, requested, nor necessary in connection with the delivery to appellants of live stock by the railroad defendants.

The complaint was dismissed by the Commission. Thereafter appellants filed a petition for reconsideration which was denied by the Commission on July 8, 1940 (R. p. 57).

THE COMPLAINT IN THE DISTRICT COURT.

Thereafter, on October 7, 1940, appellants filed in the United States District Court for the Eastern Division of Illinois, Northern District, a complaint in which it was alleged that the decision of the Commission should be enjoined, set aside, and annulled because of alleged errors of law and fact in the Commission's decision (R. pp. 1-24).

After hearing, on June 4, 1941 the District Court entered its findings of fact and conclusions of law holding in substance that the findings made by the Commission were adequate to support its conclusion that the transportation of direct shipments of live stock is completed when the live stock is placed in the railroad defendants' unloading pens at the Union Stock Yards and that the charges assessed by railroad defendant's agent, The Union Stock

Yard and Transit Company of Chicago, for stock yard services in order to obtain egress, are not subject to the jurisdiction of the Commission (R, pp. 90-97). A decree dismissing the complaint before the District Court accompanied the findings of fact and conclusions of law.

Summary of Principal Facts.

The points upon which appellants rely are argued at length under appropriate captions in the following portions of this brief. The following summary is intended as a preliminary exposition of the factual situation.

THE TYPE OF SHIPMENTS INVOLVED.

1. The case concerns only what are known as *direct* shipments of live stock consigned to appellants at the Union Stock Yards, Chicago, Ill., as a destination.

Direct shipments are defined as shipments as to which appellants are shown as the consignors in the bills of lading issued by the railroads at the points of origin, and as consignees of the shipments at Union Stock Yards, Chicago, Ill. (R. p. 157).

Direct shipments consist of live stock purchased by appellants at points other than Chicago for immediate slaughter in their packing plants adjacent to the Union Stock Yards in Chicago. No stock yard service (yardage) is desired by appellants. Appellants desire to take immediate possession of such live stock at the railroad defendants' unloading pens and have the right of immediate egress to a public street over a route to be designated by the railroad defendants. *Direct* shipments are not consigned to commission merchants at the Chicago yards for the purpose of having the stock yards furnish stock yard services customary in connection with the sale of live stock for the shipper. The term "*direct* shipments" has grown up to distinguish the class of shipments as to

which appellants or others are both consignors and consignees from shipments by live stock producers consigned to commission men at the stock yards for sale (R. pp. 159-161).

THE RAILROAD DEFENDANTS HAVE MADE THE STOCK YARDS THEIR OWN TERMINAL STATION.

2. The railroad defendants have, by their published tariffs and by failure to provide any other live stock terminal, constituted the Union Stock Yards their own terminal for the delivery of live stock in Chicago (R. pp. 182-186, and decisions of courts and Commission hereafter cited). The road engines and crews of the railroad defendants haul the live stock directly to their unloading chutes and pens at the Union Stock Yards (R. p. 182).

These unloading facilities are in effect rented by the railroads from the stock yard company. The railroad tariffs name the Union Stock Yards as their station for the delivery of live stock. The stock yard company, *as a common carrier by railroad*, publishes and files with the Commission a tariff naming a charge of $1.25 per single deck and $1.50 per double deck car for the service of unloading live stock from the cars. The tariff provides that this charge is made "as carrier's agent". The tariffs of the railroad defendants provide for payment of these charges of the stock yard company. In substance, the railroad defendants lease the facilities of the stock yard company for use as their own live stock terminal (R. pp. 180, 181).

RAILROADS HAVE PROVIDED NO MEANS OF EGRESS FROM THEIR LIVE STOCK DELIVERY TERMINAL.

3. The railroad defendants have provided no means of egress from their unloading pens, or means of access thereto, by which appellants can take possession of the live

stock upon unloading from the car and move it immediately to any public or private street or alley. After unloading from the car by the railroad defendants upon their own leased terminal, appellants can obtain their live stock only upon payment of certain yardage charges for *stock yard* (not transportation) services. At the time of the hearing before the Commission the yardage charges amounted to 45 cents per head on cattle, 35 cents on calves, 15 cents on hogs, and 10 cents on sheep (R. pp. 181, 182). These charges average $11.25 per car of cattle, $25.20 per car of calves, $13.50 per car of hogs, and $23.30 per car of sheep (R. p. 236). These charges are not published as transportation charges in any tariff filed with the Commission. They are published only by The Union Stock Yard and Transit Company of Chicago in a tariff filed with the Secretary of Agriculture in accordance with the *Packers and Stockyards Act, 1921,* and cover all stock yard services as defined in that act.

These services include (1) feeding of the live stock in proper pens; (2) watering the live stock in proper pens; (3) holding the live stock in holding pens; (4) moving the live stock to pens assigned to commission men; (5) furnishing to the commission men pens in which the live stock may be held for an unlimited time; (6) movement of the live stock after sale to pens of a purchaser or to outbound cars; and (7) weighing the live stock for the purpose of purchase and sale (R. pp. 160-175). Appellants desire none of these services but must pay for all of them in order to obtain possession of their live stock.

STOCK YARD COMPANY HAS DUAL FUNCTION.

4. The Union Stock Yard and Transit Company functions in a dual capacity. This is so found by the Commission at pages 181-182 of its decision (R. pp. 37, 38), where it is stated:

> "The Yard Company, with respect to part of its business, is a common carrier of freight by hire, is

engaged in interstate commerce, and is subject to the Interstate Commerce Act.[1] It is also a stockyard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture."

Acting in its capacity as a common carrier by railroad, the Union Stock Yard and Transit Company, by its tariff, states that it performs its services "as carrier's agent" (R. p. 181).

Alleged Errors in the Decision of the Commission.

A summary of the argument at this point would necessarily be a duplication of the detailed argument that follows. The fundamental error of the Commission is the following:

The Commission holds in substance that section 15 (5) of the *Interstate Commerce Act* has superseded, as to deliveries of live stock at public stock yards, the provisions of section 1 (3); that the railroads need not make a personal delivery at a public stock yards to a consignee and afford egress to the streets; that the Commission is without jurisdiction in the premises; and that the Secretary of Agriculture has jurisdiction.

This construction of the law necessarily applies not only to Chicago but to all public stock yards throughout the United States.

Indeed it may be said that this is a test case. In the documents transmitted to this court and marked exhibit "B" it is indicated that there is now pending before

1. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330; *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213.

2. Sections 201 to 229 of the Packers and Stockyards Act, title 7, U. S. C. A.

the Commission and undecided a proceeding known on its docket as No. 28400, *Delivery of Livestock Shipments at Cleveland, Ohio.* Appellant Swift and Company is a party to that proceeding, having a packing house adjacent to the Cleveland Union Stock Yards where it now obtains egress without extra charge. Upon authority of the decision in the present case, the railroads are seeking permission of the Commission to withdraw at Cleveland the egress which is now provided.

Since the date when this case was decided (April 8, 1940) the Commission has announced its decision in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941). The Commission there points out that at several eastern stock yards the railroads pay the stock yard company certain charges for effecting delivery and egress, the payment at Jersey City being $2.75 per car. (See appendix to brief, pp. 97, 98.)

The decision of the Commission applies a new rule of law to deliveries of live stock at public stock yards throughout the entire United States. It is therefore of public importance that the decision, being of nation-wide application, be either affirmed or corrected by this court.

ARGUMENT OF POINTS RELIED UPON.

I.

The District Court Erred in Failing to Find That Section 15 (5) of the Interstate Commerce Act Did Not Supersede or Modify the Provisions of Section 1 (3) of Said Act with Respect to the Delivery of Live Stock at Public Stock Yards; That the Legislative History of Section 15 (5) of the Interstate Commerce Act Does Not Support the Conclusion of the Commission to the Effect That Section 15 (5) Was Intended to Supersede or Modify Section 1 (3) of the Interstate Commerce Act or the Law of the Covington Case as to Unloading and Delivery of Live Stock by Railroad Common Carriers at Public Stock Yards; and That the Interstate Transportation of Live Stock to the Railroad Defendants' Station at the Union Stock Yards in Chicago Does Not End Until After Unloading for Delivery or Tender to the Consignee at Said Destination, as Specified in Assignments of Error Nos. 9, 10, 11, and 12.

THE FUNDAMENTAL ERROR OF THE COMMISSION IS ITS FINDING THAT, AS TO LIVE STOCK, SECTION 15 (5) REPEALED SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT.

In the present case the Commission held (contrary to its own prior decisions and the decisions of this and other federal courts) that section 15 (5) of the *Interstate Commerce Act* (enacted in 1920) repealed (as to delivery of live stock at public stockyards) the provisions of section 1 (3) which have existed in their present form since 1906. These sections of the *Interstate Commerce Act* appear at pages 1 and 5 of the appendix to this brief under "Statutes Cited". Appellants requested a specific conclusion of law upon this point by the District Court (R. pp. 80-81), but none was made.

The definition of "transportation" in section 1 (3), and

section 15 (5), are, for convenience, here stated in the footnote.

The Commission holds that the statutory definition of "transportation" in section 1 (3) no longer applies to the carriage of live stock to a public stock yard which has been made the terminal of the line haul railroads for the delivery of live stock. The Commission holds that as to all traffic, other than live stock destined to a public stock yard, the railroad must effect a delivery to the consignee under the definition of "transportation" in section 1 (3); but that section 15 (5) permits a railroad to deliver live stock at a public stock yard, adopted and maintained as the railroad's only live stock terminal, in such manner that the consignee must pay for a complete stock yard service under the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7), in order to obtain possession of live stock, although the shipper seeks no stock yard service, but only a mere egress from the unloading pens to a public street. The Commission says:

> "Emphasis is placed by complainant on the provisions of the act which define 'transportation' and to the inclusion in that term of the word 'delivery,' and it is contended that our jurisdiction is co-extensive with transportation as defined in section 1 (3) of the

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SEC. 1(3) "* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with the* receipt, *delivery*, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

SEC. 15(5). "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

"The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section." (p. 191.)

"The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean delivery to a public street, delivery to a plant connected by a runway, or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated." (pp. 195-196.)

To borrow the words of Mr. Justice Frankfurter, this construction of the law represents merely "a difference of views within the Commission".*

THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS ESTABLISH THE PROPOSITION THAT SECTION 15 (5) DID NOT MODIFY THE DUTY OF THE RAILROAD TO MAKE DELIVERY AS A PART OF TRANSPORTATION AS DEFINED IN SECTION 1 (3).

We hope to satisfy this court that the interstate transportation of live stock to the railroad defendants' station at the Chicago Union Stock Yards does not end until after

* *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 83 L. ed. 1147.

unloading for delivery or tender to the consignee by the railroad at that destination. Such was the doctrine of this court at common law, and this court has construed that rule as being adopted by the specific words of the *Interstate Commerce Act* both before and since the enactment of section 15 (5).

DECISION OF COMMISSION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Consideration of this question commences with the decision in *Covington Stock Yard Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73 (decided in 1891). This decision was prior to the enactment of the *Interstate Commerce Act* in its present form. Although always treated by this court as one of the leading cases, it is not mentioned in the decision of the Commission.

In the *Covington case*, this court said (pp. 135-136):

"A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, *it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees.* The *transportation* of live stock begins with their delivery to the carrier to be loaded upon its cars, and *ends only* after the stock is unloaded and *delivered*, or offered to be delivered, *to the consignee*, if to be found, at such place as admits of their being safely taken into possession."

The doctrine of the *Covington* decision was affirmed after the passage of the *Interstate Commerce Act* in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226 (decided in 1912), where the court said (p. 304):

> "'The transportation of live stock,' said this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, in treating of the duties of common carriers, irrespective of the act to regulate commerce, 'begins with their delivery to the carrier to be loaded upon its cars, and *ends* only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.'"

This decision dealt with deliveries at the Union Stock Yards in Chicago.

The next case in which this question came before this court was *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382 (decided in 1935). This decision also dealt with deliveries at the Chicago Union Stock Yards. The court there set aside the order of the Commission in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, holding that the railroad carrier was not required to furnish facilities such as alleys, overhead viaducts, and a tunnel under 39th Street to the Hygrade plant. The court further said (p. 201):

> "Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

The decision in the *Atchison case* was clarified and the doctrine of the *Covington case* reaffirmed in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198 (decided 1939).

The court there said (pp. 218-219):

> "'Section 1 (1) of the Interstate Commerce Act (49 U. S. C. A. § 1(1)) declares: 'The provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad, * * *.' Section 1 (3) (49 U. S. C. A. § 1(3)) provides that the term railroad shall include '* * * all

the road in use by any common carrier operating a railroad * * * all switches, spurs, tracks, *terminals and terminal facilities of every kind* used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards, or grounds, used or necessary in the transportation or delivery of any such property.' It defines the term 'transportation' as including 'locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, * * * and handling of property transported.' Section 15(5) (49 U. S. C. A., § 15(5)) provides, 'Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner. * * *'

"Without the aid of these statutes the *transportation* of livestock by rail *was held* to begin with its delivery to the carrier for loading onto its cars, and to *end* only after unloading for *delivery* or *tender* to the consignee at the place of destination. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461. *The same rule has been repeatedly applied since the statute was adopted. Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468, 63 L. ed. 1088, 1090, 39 S. Ct. 519; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 198, 79 L. ed. 1382, 1387, 55 S. Ct. 748, and cases cited. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469, 58 S. Ct. 990; 2 Hutchinson, Carriers, 3d ed. § 510."

* * * * * *

"That appellant's stockyard *is a terminal of the line-haul carriers*, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra* (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. &*

S. F. R. Co. v. United States, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra*. There the Commission's order directing the discontinuance of appellant's yardage charge to consignee was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish."

Attention is called to the statement by the court that the Commission's order in *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, was set aside *solely* because the Commission failed to make appropriate findings of fact as to the duty of the railroad defendants to make delivery.

It is also to be noted that this court cites the decisions in the *Atchison case* and the *Denver case* in support of the doctrine of the *Covington case*, while the Commission cites the same decisions as reversing the doctrine of the *Covington case* (Commission's decision, pp. 189-191, R. p. 53).

In this summary of decisions of this court we do not overlook *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, decided February 3, 1941. The court was there dealing solely with the question whether the Armour complaint presented issues which required preliminary administrative action by the Commission and carefully refrained from passing upon the merits of the controversy. But the court did hold directly contrary to the Commission's decision as to the Commission's jurisdiction.

The doctrine of the *Covington case* was followed by the United States Court of Appeals for the District of Columbia in *United States v. Interstate Commerce Commission*, 73 F. (2d) 948, decided in 1934. The court there said (p. 951):

"Undoubtedly, as was said in *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73, a carrier of live stock has no more right to

make a special charge for delivering the stock in and through stock yards provided by itself, *or provided by another corporation,* than a passenger carrier has to make a special charge against a passenger for the use of its passenger depot. The *duty of the carrier* begins with the delivery of the stock to the carrier to be loaded on its cars, and *ends only* after the stock is unloaded and *delivered* or offered to be delivered to the consignee, and the precise terms of the statute (section 15 (5)) impose upon it the obligation to place the stock in suitable pens without extra charge to the consignee."

The most recent construction placed by a United States Circuit Court of Appeals upon the question here involved is the decision of that court for the seventh circuit on April 4, 1940, in *Armour & Co.* v. *Alton R. Co.,* 111 F. (2d) 913, from which the following is quoted (pp. 915-916):

"(1, 2) Thus it came to pass that these yards—providing such facilities as loading and unloading platforms, chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company in supplying its yards, performs there the transportation services which the carriers are under a duty to render. Serving in this capacity *it is the agent of the carriers* and a common carrier subject to the Interstate Commerce Act. 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C. Secs. 1-27, 49 U. S. C. A. §§ 1-27; *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286, 33 S. Ct. 83, 57 L. ed. 226; *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213, 60 S. Ct. 193, 84 L. ed. 198. That it is proper for the carriers to discharge their duty to deliver at the place of destination, in this way, is clear. *Merchants' Warehouse Co.* v. *United States,* 283 U. S. 501, 506, 51 S. Ct. 505, 75 L. ed. 1227."

"(5) In passing we add that the *transportation* of livestock by rail begins with its delivery to the carrier for loading at point of origin, and *ends after* unloading for *delivery* or tender to the consignee at the place of destination. This was the rule at the com-

mon law. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, 11 S. Ct. 461, 35 L. ed. 73. *'It is the rule under the Interstate Commerce Act.* See *Union Stock Yard & Transit Co.* v. *United States, supra. No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, a mere way out to the public highways, is incidental to and part of the delivery. Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193, 201, 55 S. Ct. 748, 79 L. ed. 1382; See also dissent therein, 295 U. S. at page 203, 55 S. Ct. at page 753, 79 L. ed. 1382.''

We also call attention to the construction placed upon *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, in the footnote on page 916 of said decision of the Circuit Court of Appeals for the seventh circuit, reading as follows:

"However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens, was set aside. *Hygrade case, supra*, 295 U. S. 193, 55 S. Ct. 748, 79 L. ed. 1382. The Court was impressed by the consignee's constant use of certain property of the Yards Company namely, 'A route via the overhead runway to the Hygrade plant,' and concluded that there was no evidence that in removing the animals from the unloading pens, *the consignee used only an egress to the city streets.* However, the Court recognized that 'Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways.'

"In this connection, it is material to quote briefly: 'The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant. * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *.' *Atchison Ry. case, supra*, 295 U. S. at page 200, 55 S. Ct. at

page 752, 79 L. ed. 1382. It is to be noted that in the instant case plaintiff has borne these words in mind.

"In a recent opinion the Supreme Court said of the Atchison or Hygrade decision that 'There the Commission's order • • • was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.' *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 60 S. Ct. 193, 196, 84 L. ed. 198."

The point to be noted is that the courts have repeatedly held (this court as late as 1939 and the Circuit Court of Appeals for the Seventh Circuit in 1940) (1) that the passage of section 15(5) did not affect the rule of the *Covington* case; and (2) that *transportation* of live stock *ends* only after unloading for delivery or tender to the consignee, while the Commission specifically finds that the transportation ends "when the live stock has been unloaded into the unloading pens at the Union Stock Yards"; that is to say, before it is delivered or offered to be delivered to the consignee.

PRESENT DECISION IN CONFLICT WITH COMMISSION'S PRIOR DECISIONS.

The Commission has followed the same construction of the law in all cases except the present one.

The earliest case before the Commission was *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 601 (decided in 1887, before the enactment of section 15(5)) in which the Commission said (p. 603):

"As common carriers of live stock it is the legal duty of the defendants to provide reasonable and proper facilities for receiving on board, and for discharging from their cars, all live stock offered for shipment or brought over their respective roads and their connections to or from the City of Covington,

> Kentucky, free of charges other than the usual transportation charges. It is not believed that this legal duty and obligation of defendants is fully discharged by receiving on, and discharging from, their cars live stock at a depot, *access to which must be purchased.*"

The next decision of the Commission which involved this question was *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. That case did not involve a request for a mere egress from the unloading platforms but, as shown in the decision, the shippers were there requesting a complete stock yards service in addition to transportation (see p. 84, appendix to this brief).

In the next case before the Commission (*Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641) its construction of the law is in exact accordance with that sought here by appellants. The Buffalo Stock Yards (where live stock was delivered by the New York Central Railroad), was and is a public stock yards which files its stock yards tariff with the Secretary of Agriculture. It has recently been required to file with the Commission a tariff of its charges for loading and unloading live stock. *Status of Public Stockyards Companies*, 245 I. C. C. 241.

Because the *Allied Packers decision* contains such a full exposition by the Commission of the point here under discussion, we have included the entire decision at pages 13-23 of the appendix to this brief. Suffice it to say at this point that, after describing the origin of section 15 (5) of the *Interstate Commerce Act*, the Commission held as follows (pp. 643, 644, 646, 647, appearing in the appendix to the brief at pages 16, 17, 20, 22):

> "Under section 1 (1), the interstate commerce act applies to common carriers engaged in the transportation of passengers or property by railroad. Paragraph (3) of the same section defines the term 'railroad' as including all terminals and terminal facil-

ities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' is defined as including all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery, storage, and handling of property transported."

* * * * *

"The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession. *North Penn. Railroad* v. *Commercial B'k*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock-Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation.

"With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the *stockyards* when used to perform the service described *were terminal facilities used in the transportation of property*, and were freight depots, yards, or grounds used in the delivery of such property, and that *the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported.*"

* * * * *

"The enactment of the paragraph in question (sec. 15 (5)) is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from

public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.".

"We find that the charges herein assailed in so far as they were assessed for the use of the stockyard facilities in effecting delivery of interstate shipments *were charges for transportation* within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act."

The doctrine announced in the *Allied Packers case* was reaffirmed by the Commission in *E. Kahn's Sons Co.* v. *Baltimore & Ohio R. Co.*, 192 I. C. C. 705, where, after discussing section 15 (5), the Commission said (p. 709):

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises *without a yardage charge*. Not until the livestock can be so removed does the line-haul transportation cease."

The next case upon this point decided by the Commission was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, printed in full at pp. 24-38 of the appendix to this brief. Following its conclusions in the *Allied Packers case* and the other cases above cited, the Commission held that live stock, in carloads, consigned to complainant at the Union Stock Yards "was not and is not subject to yardage charges where delivery was or is taken at unloading pens".

The next case involving similar issues was *Adolf Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606. In that case it appeared that no charge was made if mere egress from the yards was all that was sought by the consignee, but a

charge was made if the consignee desired or received yardage service. The dismissal of that complaint was therefore in consonance with the decisions heretofore quoted.

After the present case had been submitted to the Commission its attention was called by appellants to the decision of this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, in which this court again held that the doctrine of the *Covington case* is still the law of the land and that the Commission's order in the *Hygrade case* was set aside "on the sole ground" that the Commission failed to make appropriate findings of fact. The decision of this court (December 4, 1939) is not mentioned in the decision of the Commission (April 8, 1940) although it established the error of the construction of the *Atchison case* adopted by the Commission in the present decision.

COMMISSION'S DECISION AS TO ITS JURISDICTION IN CONFLICT WITH LATER DECISION OF THIS COURT.

The Commission finds that it has no jurisdiction of the charges here involved for the access "which must be purchased" (p. 197 of Commission's decision, R. p. 55). To the contrary this court in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, holds that the Commission is the only tribunal which has jurisdiction and says:

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

Against the construction adopted by the Commission we have four decisions by this court (*United States*

v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382; *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771).

This is the paramount and controlling point in this case. If the court is of opinion that the Commission erred in its construction of the law, and its denial of its own jurisdiction, the order of the Commission should be set aside and the case remanded for further consideration by the Commission within the terms of the law. The other points set forth in the Commission's decision must fall, if its holding is incorrect as to its lack of jurisdiction.

THE LEGISLATIVE HISTORY OF SECTION 15 (5) OF THE INTERSTATE COMMERCE ACT DOES NOT SUPPORT THE CONCLUSION OF THE COMMISSION TO THE EFFECT THAT SECTION 15 (5) WAS INTENDED TO SUPERSEDE OR MODIFY SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT OR THE LAW OF THE COVINGTON CASE AS TO UNLOADING AND DELIVERY OF LIVE STOCK BY RAILROAD COMMON CARRIERS AT PUBLIC STOCK YARDS.

At pages 192 and 193 of its decision (R. pp. 49-51) the Commission reviews the legislative history of section 15 (5) and reaches the conclusion that section 15 (5) was intended to supersede the requirements of section 1 (3) as to the delivery of live stock at public stock yards. The Commission reached exactly the opposite conclusion, upon review of the same legislative history, in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, decided in 1930. We quote that portion of said decision relating to the legislative history (p. 646, pp. 20, 21 of appendix to the brief):

> "The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on ship-

ments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. *The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.* The sense of the paragraph is that the services named shall be performed at the carrier's expense without additional charge to the shipper.

"The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. *25 Ruling Case Law*, page 918."

THE PRESENT CONCLUSION OF THE COMMISSION, BASED UPON THE LEGISLATIVE HISTORY OF THE AMENDMENT, IS ALSO IN DIRECT CONFLICT WITH THE VIEWS EXPRESSED BY THE COMMISSION IN ATCHISON, T. & S. F. R. CO. V. UNITED STATES, 295 U. S. 193, 79 L. ED. 1382.

A brief was filed by the Commission in this court in 1935 in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382 (in which was reviewed the Commission's decision in *Hygrade Food Products Corp.* v.

Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553). Because we consider the discussion of this point by the Commission in that brief exhaustive and correct, we have printed the Commission's argument thereon at pages 49-55 of the appendix to the brief.

The conclusion of the Commission in connection with its discussion of the legislative history was as follows:

> "There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act, *to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else.*"

We also call attention to the argument presented by the Commission in the same brief appearing at pages 56-58 of the appendix to this brief, in which the Commission reached the conclusion that nothing in the *Packers and Stockyards Act, 1921*, nor the legislative history thereof, affects the jurisdiction of the Commission under the *Interstate Commerce Act* in so far as the delivery of live stock through public stock yards is concerned.

THE LEGISLATIVE HISTORY AS STATED BY THE COURTS SUPPORTS THE FORMER POSITION OF THE COMMISSION.

The legislative history of section 15 (5) was not summarized in the majority decision in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382, but was the subject of discussion in the dissenting opinion of Mr. Justice (now Chief Justice) Stone who was joined by Mr. Justice Brandeis and Mr. Justice Cardozo. There is nothing in the majority opinion to show that the majority differed from the minority as to the legislative history. We therefore quote the following from the dissenting opinion (p. 207):

> "The section was added by way of amendment to the bill which became the Transportation Act of (Feb-

ruary 28) 1920, chap. 91, 41 Stat. at L. 456, U. S. C. title 49, § 71, in consequence of representations made to the Committee on Interstate and Foreign Commerce of the House in behalf of the American National Live Stock Association and the National Live Stock Shippers League. See 59 Cong. Rec. 674. Their representative made bitter complaint of the practices of carriers and stock yards, in adding terminal charges to the scheduled carrier rates, so that shippers could not know in advance the cost of the complete transportation service involved in taking live stock from the point of shipment into the hands of the consignee ready to receive it at point of delivery. The resolution of the Associations asked the enactment, as a part of the Interstate Commerce Act, of the rule of the Covington Stock-Yards Co. Case, and specifically 'that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards * * * which shall include unloading into suitable pens and delivery therein at such stock yards * * * including such facilities as are necessary or in use for making such delivery.' See Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4378, House of Representatives, 66th Cong., 1st Sess., pp. 139, 141, 874, 875, 881.

"In introducing the amendment in the Senate, Senator Cummins, Chairman of the Interstate Commerce Committee, referred to the request of the Live Stock Association in emphasizing the purpose of the amendment, which he stated was to require the series of services rendered in connection with the transportation to be performed for a single scheduled rate. 59 Cong. Rec. 674. On the coming in of the conference report on the bill recommending it in its final form, the House Managers made a statement that the purpose of the amendment was to provide that the 'through rates on live stock should include unloading and other incidental charges.' 59 Cong. Rec. 3264. The legislative history from beginning to end indicates unmistakably the single purpose to give the Commission authority to remove the very abuses described

and forbidden by the Court in the Covington Stock-Yards Co. Case. It would be an incongruous result of this legislation if, by forbidding an unlawful charge for putting the live stock into the unloading pens, it had made lawful the same charge for taking it out, and had thus condemned the aggrieved shippers and consignees to the limbo from which they were earnestly striving to escape. An interpretation of a statute leading to an absurd result is to be avoided where reasonably possible, as it plainly is here. See *United States* v. *Katz*, 271 U. S. 354, 357, 70 L. ed. 986, 988, 46 S. Ct. 513; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212, 47 L. ed. 1016, 1020, 23 S. Ct. 787."

It is submitted that the more recent decision of the court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, sustains the finding based upon the legislative history just quoted, for the court there states that "without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination" and that "the same rule has been repeatedly applied since the statute was adopted."

To the same effect is the decision of the Circuit Court of Appeals for this Circuit in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, where the court said that the rule above stated was the rule at common law and is the rule under the *Interstate Commerce Act*, citing said decision of the Supreme Court.

It is respectfully submitted that the Commission erred, as a matter of law, in so much of its decision as is based upon its consideration of the legislative history of section 15 (5).

II.

The District Court Erred in Failing to Find That the Charges Here Assailed, in so Far as They Were Assessed for the Use of Stock Yard Facilities in Effecting Delivery of Interstate Shipments of Live Stock, Were Charges for Transportation Within the Meaning of That Term as Defined in Section 1 (3) of the Interstate Commerce Act; That the Interstate Commerce Commission Has Jurisdiction to Pass Upon the Legality and Reasonableness of Such Charges; That, If the Present Railroad Rates to the Railroad Defendants' Station at the Union Stock Yards Do Not Afford Compensation to the Railroads for Egress from the Pens to a Public Street, the Commission May and Should Prescribe a Reasonable Additional Charge for Such Egress; and That, If Use of the Terminal Facilities of the Union Stock Yards for Egress from Unloading Pens to a Public Street Is a Part of Transportation and If This Use Is a Service for Which Reasonable Compensation Is Justified, This Charge, Like the Unloading Charge, Is a Part of the Reasonable Transportation Rate, Determination of Which Is Committed to the Jurisdiction of the Interstate Commerce Commission, as Specified in Assignments of Error Nos. 13, 14, and 15.

The District Court was specifically requested to make the finding stated in the foregoing caption but declined to do so (R. p. 82).

The proposition that charges paid in order to obtain the necessary use of stock yard facilities in effecting delivery of interstate shipments are charges for transportation within the meaning of that term as defined in section 1 (3) of the act was determined by the Commission itself in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, where the Commission said (p. 647, appendix to brief, p. 22):

> "We find that the charges herein assailed in so far as they were assessed for the use of the stockyard facilities in effecting delivery of interstate shipments *were charges for transportation* within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We

> further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act."

This proposition is also affirmatively determined by the decision of this court in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (pp. 200, 201):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

We contend that under the decision of this court, if the present railroad rates to the railroad defendants' station at the Union Stock Yards, Chicago, do not afford compensation to the railroads for the necessary expense for egress from the pens to a public street, *the Commission may and should prescribe a reasonable charge for such egress.* This possibility was anticipated by counsel for appellants during the trial of the case before the Commission. Appellants did not seek throughout the hearings before the Commission to have this service accorded free of charge if in fact it will involve the carriers in more than their present cost. To that extent the actual terms of the prayer of the complaint were amended at the hearing (R. pp. 218, 219, 223).

The evidence shows that these so-called yardage charges for full stock yard services average $11.25 per car on cattle, $25.20 per car on calves, $13.50 per car on hogs, and $23.30 per car on sheep (R. p. 236).

As indicated in that portion of the record to which reference is made, appellants are not asking for stock yard services, and the Commission has so found (R. pp. 40, 41). Appellants are perfectly willing to have the Commission fix

an additional charge for egress of direct shipments, if the carriers incur additional expenses in affording such egress. *We are not asking for the future that a cent be taken from the present earnings of the railroads, and this has been made plain throughout the hearings before the Commission.*

In view of this fact we have been somewhat surprised by the earnest opposition of the railroad defendants, apparently upon the theory that it would cost them something and add to their present operating expenses.

We believe it fair to say that appellants anticipated the rule announced in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (p. 201):

> "*Third.* If the railroad delivers through the public stock yards, and petitioner's position is sustained, the railroad must necessarily absorb the additional charge. Under the complaint, this would be upon the basis that the railroad had not fully performed its transportation service. Yet the tariff charges for shipping petitioner's livestock were based upon the long-standing custom in which petitioner and the other packers had acquiesced. The railroad is entitled to receive and the shipper is required under the statute to pay a just and reasonable rate. A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules."

Assuming that egress is required as a matter of law and conceding, but without knowing certainly, that egress might require the railroads to pay the stock yard company something in addition to its present loading and unloading charges—something for the use of the shortest route to a public street—appellants have taken the position that the Commission should add to the line haul rate such an amount as it might be necessary for the railroads to pay, if any.

THE COMMISSION ERRED IN GIVING WEIGHT TO THE FACT, IF TRUE, THAT THE RAILROADS DO NOT OBTAIN COMPENSATION FOR YARDAGE. IT IS THE DUTY OF THE COMMISSION TO FIX A PROPER CHARGE FOR EGRESS, AND THIS COURT HAS SO HELD.

It was alleged in the complaint in the District Court (par. 25, R. p. 20) that the Commission erred in basing its decision in part on the following finding at page 188 of the decision (R. p. 45):

> "They (meaning the carriers) have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover *yardage* services."

It is submitted that the findings so made by the Commission do not constitute a ground for dismissal of the complaint. It should be obvious that the rates to the stock yards not only do not include an allowance to cover *yardage* services, but should not. No *yardage* service is desired.

If, however, the rates are not now sufficiently high to cover such additional cost as may be incurred by the railroad defendants in providing mere egress, the Commission should have held this charge to be a transportation charge, as it did in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and should have determined what would be a proper additional charge, if any, for egress.

The Commission was in fact urged by appellants to do this during the course of the hearing. The record, at pages 219, 220, 221, and 369, shows this action on the part of appellants. The Commission may not lawfully avoid the duty to make a proper readjustment of the line haul rates on *directs*, to cover any additional expense incurred by the line haul carriers, if appellants, as a matter of law are entitled to egress.

We submit that the Commission erred in disclaim-

ing jurisdiction and dismissing the complaint instead of performing its duty of determining what would constitute a reasonable charge for the transportation service of mere egress.

III.

The District Court Erred in Failing to Find That No Stock Yard Services, Subject to the Packers and Stockyards Act, 1921 (U. S. C. A. Tit. 7, § 201), Are Desired or Requested by Appellants in Connection with the Delivery of Live Stock by the Railroad Defendants at Their Station at the Union Stock Yards in Chicago, as Specified in Assignment of Error No. 1.

Title III, section 301 (b), of the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7, § 201(b)) defines stock yard services as follows:

> "The term 'stockyards services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;"

The prayer of the complaint before the Commission (exhibit "A" to the complaint in the District Court, R. pp. 24-33) requested an order of the Commission providing in substance that appellants "be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago."

The stock yard services performed by the stock yard company under this provision of the law and in accordance with its tariff filed with the Secretary of Agriculture are described in detail at pages 159-175 of the record. The services of the stock yard company and the charges therefor include the service of feeding, watering, holding in pens

for disposition by commission men, delivery to commission men, weighing for commission men, taking live stock to pens for outbound shipment, and weighing in order to enable the buyer and seller to determine the amounts to be paid. It is there made clear that none of those services are desired, requested, or needed by appellants. Yet appellants must pay for these stock yard services in their entirety.

The decision of the Commission sufficiently shows that none of these services are desired or requested by appellants. That proposition is clearly stated in the following language at page 184 of the Commission's decision (R. pp. 40, 41):

> "All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.
>
> "'Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge."

IV.

The District Court Erred in Failing to Find That Section 406 (a) of the Packers and Stockyards Act, 1921 (U. S. C. A. Tit. 7, § 226), Reserves to the Interstate Commerce Commission Power and Jurisdiction Over All Matters Relating to the Transportation and Delivery of Live Stock by Railroad Common Carriers, Including All Services Essentially a Part of Such Transportation and Delivery; and in Failing to Find That the Commission Erred in Holding That the Secretary of Agriculture Has Asserted or Has Jurisdiction Over, and Has Fixed Charges For, Mere Egress from Railroad Unloading Pens at Public Stock Yards to a Public Street for Live Stock Upon Which No "Yardage Service", as Defined in the Packers and Stockyards Act, 1921, Is Requested, Desired, or Received, as Specified in Assignments of Error Nos. 17 and 19.

A finding upon this point was requested of the District Court by appellants (R. pp. 84, 85, proposed findings Nos. 9 and 11), but the District Court did not make a specific finding thereon.

Section 406 (a) of the *Packers and Stockyards Act, 1921*, (U. S. C. A. Tit. 7, § 226) reads as follows:

> "SEC. 406 (a). Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

At page 195 of its decision (R. pp. 53, 54) the Commission states* that the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards and, in support thereof, it cites three cases:

> *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. ed. 1033.

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*"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States*, *supra*; *Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary."

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470, 82 L. ed. 1469.

Union Stock Yards Co. of Omaha v. *United States*, 9 F. Supp. 864.

The court will read these decisions in vain to find any word, phrase, or sentence referring to mere egress at a public stock yards.

The decisions of the Secretary of Agriculture in these cases were filed as exhibits in the hearings before the Commission and are now before this court as a part of the exhibits separately certified on this appeal. They are—

B.A.I. Dkt. No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company* (exhibit 43 in the present case).

B.A.I. Dkt. No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Company* (exhibit 41 in the present case).

B.A.I. Dkt. No. 344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.* (exhibit 42 in the present case).

A complete discussion of these decisions of the Secretary, with quotations therefrom, appears at pages 76-83 of the appendix to the brief and will not be repeated here. Each case was instituted by the Secretary of Agriculture on his own initiative to determine reasonable rates for *stock yard services* under the *Packers and Stockyards Act, 1921*—not to determine any duty of a railroad. They show that *no question of mere egress from a railroad unloading pen to a public street was involved in any of the three cases.* They show that in each instance the Secretary fixed charges covering a complete stock yard service of holding, feeding, watering, placing in commission men's pens, etc. In each of the three cases before the Secretary *neither a railroad nor a shipper was a party.*

No one was before the Secretary in any of these cases demanding that the railroads afford egress from the unloading pens without stock yard service. Such a complaint could not have been brought before the Secretary, because whatever duty a railroad carrier may have in that respect devolves upon the carrier with whom the shipper has a contract of transportation and not upon a stock yard company which undoubtedly has the right to charge separately for all stock yard services rendered by it under the *Packers and Stockyards Act, 1921.*

In this connection it is interesting to note that the Commission has cited the *Denver case* (*Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470, 82 L. ed. 1469) as supporting the proposition that the Secretary of Agriculture has assumed jurisdiction over egress while this court, in *Union Stock Yard & T. Co.* v. *United States,* 308 U. S. 213, 84 L. ed. 198, at page 219, cites that very decision as supporting the doctrine of *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, 35 L. ed. 73.

The distinction between stock yard service and mere egress, and the reasons why jurisdiction over the latter remains in the Commission, have perhaps nowhere been better stated than in the *Commission's brief* in this court in *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193, 79 L. ed. 1382, which is quoted from at length at pages 39-58 of the appendix to this brief. We here quote what was said by the Commission upon that point (appendix to brief, p. 55):

> "It is true of course that in the great majority of instances the transportation of live stock to public stockyards does end upon the unloading of the animals into suitable pens, *because the great bulk of live stock shipments to public stockyards are intended for commission men and traders doing business in the yards. In such instances a stockyards' service is furnished* and when that is so the common-carrier transportation, and consequently the jurisdiction of this

Commission, ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act begins. The decision of the Supreme Court of Missouri in *Burton* v. *Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the live stock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, *that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a live stock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege.* There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act *to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else.*"

The section of the *Packers and Stockyards Act, 1921*, (U. S. C. A. Tit. 7, § 226, appendix to brief, p. 5), providing that nothing in that act should affect the power or jurisdiction of the Commission, was passed in 1921.

The jurisdiction of the Commission over mere egress was exercised as late as 1930 in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and as late as 1933 in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553. The Commission's jurisdiction over the subject matter was made clear by this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, decided in 1939. If there remained any doubt

upon this point, it was finally set at rest in *Armour & Co. v. Alton R. Co.*, 312 U. S. 1[illegible], 85 L. ed. 771 (decided in February, 1941) where this court said (p. 200):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

V.

The District Court Erred in Failing to Find That the Union Stock Yard and Transit Company Is a Terminal of the Railroad Defendants, Within Section 1 (3) of the Interstate Commerce Act; Performs Their Railroad Terminal Services (as Their Agent); and Files with the Interstate Commerce Commission a Tariff Naming Its Charges for Terminal Services "As Railroad's Agent"; That the Union Stock Yards Is Named in the Railroad Tariffs as a Specific Station to Which the Railroad Rates to Chicago Are Applicable; That the Union Stock Yards at Chicago Have Become the Common Live Stock Depot of the Railroad Defendants; and That the Stock Yard Company, in Supplying Its Unloading Facilities and Runways (as Agent for the Railroads), Performs the Transportation Services Which the Railroad Defendants Are Under a Duty to Render, as Specified in Assignments of Error Nos. 5 and 6.

Specific findings upon the points here stated were requested of the District Court by appellants, but none were made. See record pages 78, 79, page 4 of findings of fact and conclusions of law requested by appellants.

That the Union Stock Yards is named in the railroad tariffs as a specific station to which the railroad rates to Chicago are applicable is undisputed. The method of tariff publication by which this result is accomplished is described minutely in the testimony of the witness Tally (R. pp. 183-186). The line haul railroads

publish an allowance to the stock yards of $1.25 per single deck car and $1.50 per double deck car for unloading live stock. The stock yard company files with the Interstate Commerce Commission its tariff which publishes the same amounts as charges for unloading live stock "as carrier's agent" (R. pp. 180, 181).

That the railroad defendants have in fact made the Union Stock Yards their own terminal for delivery of live stock in Chicago has been decided too often by this court and by the Commission to be open to question.

Referring to the Union Stock Yards at Chicago, this court said, in *Adams* v. *Mills*, 286 U. S. 397, 76 L. ed. 1184, at page 409:

> "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so."

In the recent decision in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, the court said (p. 219):

> "That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra*, (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra*."

To the same effect was the decision of the Circuit Court of Appeals for the seventh circuit in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, 915:

> "Thus it came to pass that these yards—providing such facilities as loading and unloading platforms chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company, in supplying its yards, performs there the transportation services which the carriers are under a duty to render."

In the early case of *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277, the Commission said:

"The tariffs of the defendants all specified a rate to Chicago and under this tariff *the public were entitled to ship to the Union Stock Yards*" (p. 289).

"What we call attention to is the fact that a railroad may maintain its live stock depot at a particular point although it neither builds nor repairs nor insures the stock pens into which the cattle are unloaded nor hires nor controls the men who do the unloading. Whether the Union Stock Yards at Chicago were in railroad phraseology or in legal definition the depot of these defendants is immaterial; they were and still are in fact the point to which this stock is transported and unloaded under the shipping contract of the defendants" (p. 293).

In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 219, 220, the Commission (referring to the Chicago Union Stock Yards) said:

"These stock yards, however, are in fact a terminal for the receipt and delivery of live stock; that is one of the purposes for which they were created and one of the uses to which they are now put. The situation appears to be exactly the same as it would be were the stock yards outside the city limits of Chicago. The stock yards must be the terminal for the receipt and delivery of live stock of the railroad utilizing them."

In *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164, 168, (referring to the Chicago yards), the Commission found:

"Under this state of facts we are of opinion and find that the stock yards are in effect *terminals of the line-haul carriers*, the Junction company, and the stock yard company."

In *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, 554, the Commission said:

"The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual

line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers."

In *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 336, 337, the Commission said:

> "Through custom and usage respondent's yards have become *for all practical purposes the sole terminal in Chicago* for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery."

In *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, there was a detailed description of the facilities in and about Chicago and in that connection the Commission said at page 545:

> "The line-haul carriers operate over the tracks of the Chicago Junction to the Union Stock Yards and make delivery there, thereby making these yards their own terminals."

In the same decision, finding No. 5 of the Commission (p. 551) was as follows:

> "The railroads recognize their obligation to deliver on their own rails under the line-haul rate and without extra expense. To give color, therefore, to the claim that delivery at the Union Stock Yards is an extra service justifying an extra charge, a number of them make a pretense of providing points for livestock delivery on their own rails. *The record shows, however, that these points are nothing more than a pretense, are not used, and could not be used to effect suitable and adequate deliveries.* As a matter of fact, as above stated, the Union Stock Yards is a point of livestock delivery for all the lines and it is, through trackage rights, in effect located on their own rails."

In *Livestock To or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 766, the Commission said:

> "As was stated in *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, the Union Stock Yards

'have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail'."

Thus we find an unbroken line of decisions of the Commission, commencing in 1905, which hold that the stock yards are the terminals of the line haul carriers for the delivery of live stock.

In *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565, referring to the Bourbon Stock Yards at Louisville, Ky., which are and always have been public stock yards exactly similar to those at Chicago, this court said (p. 570):

> "The Bourbon Stock Yards are the defendant's depot. *They are its depot none the less that they are so by contract, and not by virtue of a title in fee.* • • • The fact that plaintiff's stock yards are public does not change the case."

The facts of record to which reference has been made, together with the decisions here quoted, establish the proposition that the Union Stock Yards have become the common live stock depot of the railroad defendants at Chicago and that the stock yard company, as agent of the railroads, there performs the transportation services which the carriers are under a duty to render.

VI.

The District Court Erred in Failing to Find That the Union Stock Yard and Transit Company Functions in a Dual Capacity: (a) As a Public Stock Yards Providing Stock Yard Services, Subject to the Packers and Stockyards Act, 1921; and (b) as a Common Carrier by Railroad Subject to the Interstate Commerce Act, in Which Latter Capacity the Stock Yard Company Provides (as Railroad's Agent) Terminal Facilities for the Delivery of Live Stock, Which Are a Part of the Railroad Defendants' Railroads, Under Section 1 (3) of the Interstate Commerce Act, as Specified in Assignments of Error Nos. 7 and 8.

The propositions stated in this point are undisputed (Commission's decision herein, R. pp. 37, 38). The Union Stock Yard and Transit Company does function

in a dual capacity. That company has been designated by the Secretary of Agriculture as a public stock yards subject to the *Packers and Stockyards Act, 1921* (U. S. C. A. Tit. 7). For stock yard services it files a tariff with the Secretary of Agriculture. At the time of the hearing before the Commission these services and the charges therefor were stated in U. S. Y. & T. Co. tariff No. 10 which is exhibit 3 in the exhibits transmitted to this court separately from the transcript of evidence.

It is undisputed that the Union Stock Yard and Transit Company also provides "as railroad's agent" terminal facilities and services for the railroads, which become in substance railroad facilities (paid for by the railroads) under section 1(3) of the *Interstate Commerce Act*. Acting in this capacity, the Union Stock Yard and Transit Company has been held to be a common carrier by railroad subject to the *Interstate Commerce Act* and files its tariff with the Interstate Commerce Commission. This latter point was decided by this court in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Specific findings to this effect were requested of the District Court by appellants (R. pp. 70, 80), but were not made.

VII.

The District Court Erred in Failing to Find That the Fact That Egress from the Railroad Defendants' Unloading Pens to a Public Street Would Necessarily Be Across Property of Their Agent, Union Stock Yard and Transit Company, Does Not Deprive the Commission of Authority to Make an Order Against Said Railroad Defendants Requiring Egress for Appellants' Shipments, With or Without a Rate Change Covering Such Service, as Specified in Assignment of Error No. 16.

The Commission appears to have construed the fact that egress from the unloading pens to a public street would be across property of the stock yard company as an

insuperable bar to the relief here sought. The Commission said (decision, pp. 184-185, R. p. 41):

> "Because of the physical situation at the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company."

It is true that, having placed the live stock within the confines of the stock yards, they could not be driven to a public street except by crossing certain stock yard property. But this fact is without legal significance in the present controversy. A finding to this effect was sought in the District Court. See Findings of Fact and Conclusions of Law proposed by appellants (R. p. 83). But no finding was made by the District Court.

We have shown (this brief, pp. 41, 42) that the railroad defendants name rates on live stock to the Union Stock Yards as a station on their lines; that in substance the railroad defendants lease the stock yard unloading pens, in lieu of providing pens of their own, by payment to the stock yard company of a stated amount per car; that the stock yard company files with the Commission its tariff naming its charges for loading and unloading live stock "as carrier's agent"; and that the stock yard company has been held to be a common carrier by railroad in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198.

These facts being undisputed, certain statutory provisions come into play which in effect make the property of the stock yards a part and parcel of the railroads in so far as they are necessary or used in transportation. This is so for the following reasons:

(a) The definition of railroad in section 1 (3) (a) of the Interstate Commerce Act includes "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, *agreement*, or lease, * * * *all* * * * *terminal facil-*

ities of every kind * * * necessary in the * * * *delivery* of any such property".

(b) The term "transportation", as defined in section 1 (3) of the act, includes "all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof* * * * in connection with the * * * delivery * * * of property transported."

(c) Section 1 (6) places upon the defendants the duty to "establish * * * just and reasonable regulations and practices affecting * * * *delivery* of property * * * upon just and reasonable terms."

(d) Section 15 (1) authorizes the Commission to prescribe a *regulation* or *practice* where it finds the present regulation or practice to be unjust or unreasonable, or otherwise in violation of the act.

(e) Section 16 (7) provides that "it shall be the duty of every common carrier, its *agents* and employees, to observe and comply with such orders so long as the same shall remain in effect."

Thus the terms of the law definitely establish the proposition that ownership is immaterial if such property is used in a transportation service. The stock yard company holds itself out, as a common carrier, as the agent of the railroad defendants. Under section 16 (7) therefore the stock yard company, as the agent of the railroad defendants, would be bound to comply with any order made against the railroad defendants.

The right of the shipper or consignee to a reasonable practice or charge, and the power of the Commission to grant the necessary relief by order, is not dependent upon the ownership of the particular facility used by the railroad but is dependent solely upon the use of the facility for transportation purposes.

The railroad defendants have selected the point in Chicago where they have located their only proper and adequate facilities for the delivery and unloading of live stock

That point is on the property of their agent, Union Stock Yard and Transit Company, *a common carrier by railroad.* Those facilities are rented by the railroad defendants from their agent and have, by compulsion of the statute, become the facilities of the railroads to the same extent as if owned by them.

The railroad defendants have in fact made the stock yards their own terminal for the delivery of live stock. That point has been decided too often to be open to question. In support of this proposition we refer to the following decisions which have been quoted in part at pages 42-45 of this brief:

Adams v. *Mills*, 286 U. S. 397, 76 L. ed. 1184.

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198.

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913.

Cattle Raisers' Asso. v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. Rep. 277.

Live Stock Loading and Unloading Charges, 52 I. C. C. 209.

Live Stock Loading and Unloading Charges, 58 I. C. C. 164.

Hygrade Food Products Corp. v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330.

Chicago Live Stock Exc. v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531.

Livestock To or From Union Stock Yards, Chicago, 222 I. C. C. 765.

In *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565, referring to the Bourbon Stock Yards at Louisville, Ky., which are and always have been

public stock yards exactly similar to those at Chicago, this court said (p. 570):

> "The Bourbon Stock Yards are the defendant's depot. *They are its depot none the less that they are so by contract, and not by virtue of a title in fee.* * * * The fact that plaintiff's stock yards are public does not change the case."

In stating this conclusion this court was merely repeating what it had said earlier in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73:

> "If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees."

The Commission held in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, that yardage charges assessed for the use of stock yard facilities at a public stock yards in effecting delivery of shipments are charges for transportation. (See quotation from this decision at page 24 of this brief and the entire decision at pages 13-23 of appendix to the brief.)

If the stock yard company should insist upon additional compensation from the railroads, and the present line haul rates are not adequate to include such compensation, it becomes the duty of the *Commission to determine what would be a reasonable additional charge* for mere egress, and authorize it to be added to the existing freight charges on direct shipments where mere possession, *not yardage service*, is demanded by the consignee.

VIII.

The District Court Erred in Failing to Find That the Railroad Defendants Do Not Provide the Delivery of Live Stock to Which Appellants Are Entitled as a Matter of Law, by Placing Cars of Live Stock Upon Railroad Team Tracks or Appellants' Private Plant Tracks, Which Are Not Equipped with Unloading Facilities, Such as Chutes, Pens, or Yards, Necessary for the Delivery of Live Stock, as Specified in Assignments of Error Nos. 2, 3, 23, and 24.

The Commission found (decision, p. 189, exhibit "B" to the complaint, R. p. 46) that shippers of live stock to Chicago have the choice of consigning it to the Union Stock Yards, and having it unloaded there without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district without payment of a yardage charge. The Commission said (p. 189):

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, *and do not include pens into which the stock may be unloaded*, they have been found ample for such shipments as have been placed on such tracks for unloading."

Findings by the District Court in conformity with this point were specifically requested (see plaintiffs' proposed findings Nos. 2, 3, 16 and 17, R. pp. 77, 87, 88) but none were made.

THE EVIDENCE SHOWS THAT THE RAILROAD TEAM TRACKS HAVE NO FACILITIES FOR UNLOADING LIVE STOCK.

Only two railroad witnesses testified concerning facilities for deliveries of live stock in Chicago on railroad team tracks. R. A. Sperry, one of these witnesses, testified in substance as follows:

> None of the railroad team tracks which I have examined have any chutes or runways for taking live stock out of the cars. I did not look at them while a car of live stock was being unloaded. I have not seen the operation. I did not see any facilities in the way of chute pens for getting live stock from the car to the ground (R. pp. 430, 431).

F. F. Hoffman, the only other witness who gave evidence concerning delivery of live stock on the railroad team tracks, testified substantially as follows:

> I have examined the places where team track deliveries of live stock are made. There are no facilities except the track. There are no pens, no unloading pens, merely open space beside the track. The recipient of the live stock backs his truck against the car door and moves the live stock into the truck. I do not know how they arrange to get truck delivery (R. p. 473).

The decision of the Commission itself states that the team tracks "do not include pens into which the stock may be unloaded".

THE DECISIONS SHOW THAT RAILROADS DO NOT PROVIDE A LAWFUL DELIVERY OF LIVE STOCK BY PLACING CARS UPON TEAM TRACKS WHICH ARE NOT EQUIPPED WITH PENS AND OTHER UNLOADING FACILITIES.

The conclusion of the Commission is contrary to the law upon the subject as heretofore declared by the courts and by the Commission itself.

In *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73, the court said:

> "When live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except *in or through inclosed yards or lots*, convenient to the place of unloading."

That has continued to be the law since the passage of the *Interstate Commerce Act*. This rule was affirmed by the Supreme Court after enactment of the *Interstate Commerce Act*, in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 57 L. ed. 226 (1912).

This rule was stated by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 118 F. 113, 116, as follows:

> "The animals cannot be turned loose, or left without food or shelter in cars standing on the railroad tracks or sidings. They must be placed in suitable quarters, where they can be fed and cared for under the charge of competent agents. The nature of the property requires these services, essential to the discharge of the duty of the carrier in the safe transportation and delivery of live stock. For this purpose it is the duty of the carrier to make provision by suitable yards and proper equipment and competent persons to manage and control the care and delivery of the live stock."

The Commission has included delivery into suitable pens as a part of the carriers' duty in all of the decisions made by it under the *Interstate Commerce Act* except the present case. This point is established by the following decisions of the Commission:

In *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, at page 99, the Commission said:

> "Since the transportation of live stock begins with delivery to the carrier for loading upon its cars *and ends only after the stock has been unloaded by the carrier into suitable pens*, the movement over defendant's rails leading to its docks is transportation."

In *Switching Charges at South Omaha, Nebr.*, 36 I. C. C. 198, 200, the Commission said:

> "These earnings include receipts for loading and unloading live stock at the stockyards. They are properly included, as the transportation of live stock begins with delivery to the carrier for loading on its cars *and ends only after the stock has been unloaded by the carrier into suitable pens. A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99."

In *Felin & Co.* v. *P. & R. Ry. Co.*, 37 I. C. C. 231, 233, the Commission said:

> "Carriers of live stock unquestionably must provide *suitable facilities* for loading, unloading, and caring for live stock, including suitable pens, but not at every point on their lines where dealers in live stock choose to establish their plants."

In *Dimmitt-Caudle-Smith Live Stock Commission Co.* v. *C., B. & Q. R. R. Co.*, 47 I. C. C. 287, the Commission said at page 318:

> "In this connection it may be added that the transportation of live stock does not terminate until after the stock has been unloaded by the carrier *into suitable pens. Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; *United States* v. *Union Stock Yards*, 226 U. S. 286; *A. T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99. The duty to unload stock *into suitable pens* includes the duty to provide such facilities and the means of reaching them, or else to hire those owned by others."

In *American National Live Stock Asso.* v. *A., T. & S. F. Ry. Co.*, 122 I. C. C. 609, 617, the Commission said:

> "Loading and *unloading pens and chutes* must be provided, not only at points where the traffic originates and where it is delivered, but at intermediate points as facilities for stopping stock in transit for water, feed, and rest."

A similar statement was again made in *E. Kahn's Sons*

Co. v. Baltimore & O. R. Co., 192 I. C. C. 705, at page 709, where the Commission said:

> "The shipping public is entitled to *reasonably convenient and safe chutes, pens and ways for discharging live stock from the cars*, and taking them from the carrier's premises without a yardage charge. Not until the live stock can be so removed does the line-haul transportation cease."

The Commission erred as a matter of law in holding, as it does, that because appellants may obtain delivery without yardage charges at the *team tracks*, where the railroads maintain no pen facilities, they are not entitled to delivery at the Union Stock Yards, the only point where the railroad defendants maintain such facilities. Appellants cannot be required to accept a delivery (team track delivery) which does not conform to the carriers' duty at common law or under the *Interstate Commerce Act*.

Certain of the practical reasons why unloading pens and chutes are necessary to a proper delivery of live stock are indicated in *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 118 F. 113, from which we have already quoted.

By the provisions of the so-called 28-Hour Law (45 U. S. C. A. §§ 71-74) railroads are required to unload live stock into properly equipped pens for rest, watering, and feeding at the end of twenty-eight or thirty-six hours. If this period should expire before the consignee arrived to remove the live stock from the cars on the team tracks, it is apparent that the railroads would not be in position to unload the live stock, as required by the 28-Hour Law, at the point where the cars are placed for unloading.

The Commission itself has held that the carriers' team tracks in Chicago are not suitable for the delivery of live stock. In *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, the Commission held in substance that such points do not provide adequate facilities, or in-

deed any facilities, for the unloading of live stock. At page 532 of the decision in that case, the Commission said:

> "While certain of the trunk lines claim that they have suitable places on their own rails at Chicago for the delivery of livestock, in connection with which delivery no charge in addition to the Chicago rate is made, * * * *the Union Stock Yards constitutes the only place in Chicago where livestock is delivered in substantial volume and adequate facilities therefor are provided.*"

We respectfully submit the court should find that a consignee may not lawfully be compelled to accept delivery of live stock by the railroads at tracks not provided with the necessary chutes and pens. Therefore an alternative method of delivery at Chicago without charge above the line haul rate to Chicago does not exist.

FOR THE REASONS STATED IN CONNECTION WITH TEAM TRACK DELIVERIES, IT IS ALSO APPARENT THAT THE RAILROADS DO NOT OFFER A LAWFUL DELIVERY OF LIVE STOCK BY PLACEMENT UPON INDUSTRIAL TRACKS NOT EQUIPPED WITH UNLOADING CHUTES AND PENS.

The Commission stated (at page 189 of its decision):

> "In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate."

The record shows that appellants' industrial side tracks, like the railroad team tracks, are not equipped for unloading live stock. Mr. M. J. Barron, at pages 763, 764 of the record, testified in substance as follows:

> Exhibit 92 is a map showing the tracks adjacent to the Swift plant in the Union Stock Yards district. Upon this map are legends for each loading or unloading dock and the purpose for which it is used. I have made a personal inspection of all the tracks noted.

on this map since it was prepared. There are no facilities by way of pens or chutes for the unloading of live stock on any of the industry tracks serving the plants of Swift and Company in the stock yards district.

IN ADDITION, FOR DELIVERY OF LIVE STOCK UPON APPELLANTS' INDUSTRIAL SIDE TRACKS, APPELLANTS WOULD BE REQUIRED TO PAY $19.50 PER CAR ABOVE THE RATE TO CHICAGO, OR TO THE UNION STOCK YARDS.

The evidence upon this point appears at pages 762, 763 of the record and is not disputed. It shows in substance that Swift and Company is listed as an industry upon the Chicago Junction Railway and that to reach Swift's industry tracks a combination of rates would be applicable, made up of the rate to the chutes of the Union Stock Yard and Transit Company (which is one station) plus a switching charge of $19.50 per minimum carload applicable from the unloading chutes to appellants' industry tracks (which are a different station).

The Union Stock Yard and Transit Company is named in the railroad tariffs as a station of the railroads. Under these conditions appellants have an unqualified right to consign their live stock to the Union Stock Yards station of the railroads rather than to an industrial side track (not equipped with unloading facilities) which would involve an additional switching charge of $19.50 per car above the railroad line haul rate to the railroads' terminal unloading facilities at the Union Stock Yards.

Where two stations are so named, one requiring the payment of a freight rate of $19.50 per car higher than the other, the shipper is under no obligation to select the station to which the higher rate applies merely to avoid the consequences of the carrier's failure to afford a proper delivery of live stock at the only station equipped for that purpose.

IX.

The District Court Erred in Failing to Find That Appellants Cannot Be Deprived by the Railroad Defendants of a Lawful Delivery of Live Stock at Said Railroad Defendants' Live Stock Station at the Union Stock Yards in Chicago, Because Live Stock May Be Delivered at the Unloading Facilities of the Omaha Packing Company at 26th & Halsted Streets (Another and Different Station), Approximately Three Miles from Appellants' Plants at the Union Stock Yards, at Which the Railroad Defendants Do Not Maintain Their Own Facilities for Unloading Live Stock; and That Appellants Have a Right to Obtain a Lawful *Delivery of Their Live Stock at* the Facilities Provided by the Railroad Defendants at the Union Stock Yards Adjacent to Appellants' Plants, as Specified in Assignment of Error No. 26.

A specific finding to the effect indicated in this caption was requested of the District Court (par. 19 of proposed conclusions of law, R. pp. 88-89), but no such finding was made.

The proposition above stated would appear to be self-evident. The unloading facilities of the Omaha Packing Company are private facilities owned by that company, located about three and a half miles distant from appellants' plants in the stock yards area (R. p. 255). When live stock is delivered at the pens of the Omaha Packing Company plant it must be moved from those unloading pens by truck to the plant of appellant Swift and Company at the stock yards. The record shows that the average cost of such trucking is 3.5 cents per head on hogs, 15 cents per head on cattle, 3.5 cents per head on calves, and 1.75 cents per head on sheep (R. p. 370).

Appellants cannot be denied the right to ship their live stock to the station provided by the railroads as their live stock terminal and there receive the service required by law. The unloading facilities at the Omaha plant are private tracks and pens. That industry is shown as a separate station in the railroad tariffs. The only place

where the railroads maintain facilities or their own are at the Union Stock Yards. Appellants have a right to demand the use of *railroad* facilities. Appellants have an unqualified right to consign their live stock to the railroad station most convenient to their plants, designated as a live stock terminal by the railroads, and that station or terminal is at the Union Stock Yards.

If the statement appearing in the Commission's decision, which is the last sentence in the first paragraph on page 189 (R. p. 46), were enlarged to correspond with the undisputed evidence, it would read as follows (our own interpolations being indicated in italics):

> "More than one-third of the direct shipments of live stock arriving at Chicago, *being the 10,000 cars of direct shipments by complainant to the unloading facilities of the Omaha Packing Company*, are unloaded at points other than the Union Stock Yards; *that is to say, at the private unloading facilities of the Omaha Packing Company, three miles from the Union Stock Yards district; and in order to bring such shipments to their desired destination complainant must pay for trucking at a cost of approximately $3.75 per car on cattle and must maintain its own unloading facilities and unload the live stock at its own expense.* It appears, therefore, that direct shipments of live stock are unloaded at the Union Stock Yards only when complainant elects to take delivery there."

This record and the decisions of the Commission herein cited show that the railroads have no facilities of their own properly equipped for the unloading of live stock except the pens and chutes at the Union Stock Yards. It is submitted that appellants have a right to obtain a lawful transportation service in connection with the delivery of their live stock to the specific station which the railroads have named as their live stock terminal.

X.

The Commission Erred in Giving Weight to An Alleged Interpretation of Section 15 (5) by the Actions of the Packers, the Producers, the Yard Company, and the Railroads.

The Commission's decision as to its lack of jurisdiction and its construction to the effect that section 15 (5) superseded section 1 (3) apparently is based in part upon that portion of its decision commencing with the first paragraph on page 196 (R. pp. 54-55) in which the Commission states that the construction now adopted by it is "the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads". But the courts have repeatedly held to the contrary, since the enactment, as indicated in the decisions quoted at pages 15-21 herein.

THE COMMISSION ERRONEOUSLY FAILED TO FIND THAT A CONTRARY CONSTRUCTION HAS BEEN PLACED UPON THE STATUTE AT MANY OTHER POINTS.

It was alleged in paragraph 20 of the complaint in the District Court (R. pp. 14-15) that the Commission erred in failing to include in its report any reference to evidence offered by appellants which shows that delivery of direct shipments of live stock to the consignee, without charge in excess of the published tariff rate, where stock yard services are not required or requested by the consignee, is provided at many important stock yards which are served by the railroad defendants; and in failing to find that in one instance of this kind (*Allied Packers case, infra*) the practice was prescribed by the Commission and in another instance (*Kahn case, infra*) is in accordance with a finding of the Commission. The evidence upon this point appears

in full at pages 189-206 of the record in this court. It is summarized at pages 92-100 of the appendix to the brief. It shows that egress, without a stock yard service and without an addition to the line haul rate, is permitted without charge at the following stock yards:

Union Stock Yards Company of Baltimore, Md.
Buffalo Stock Yards, East Buffalo, N. Y.
Cincinnati Union Stock Yards, Cincinnati, Ohio.
Cleveland Union Stock Yards, Cleveland, Ohio.
Detroit Stock Yards, Detroit, Mich.
Indianapolis Stock Yards, Indianapolis, Ind.
Los Angeles Union Stock Yards Company, Los Angeles, Calif.
Bourbon Stock Yards, Louisville, Ky.
Muncie National Stock Yards, Muncie, Ind.
West Philadelphia Stock Yards Company, Philadelphia, Pa.
Pittsburgh Joint Stock Yards, Pittsburgh, Pa.
Wichita Union Stock Yards Company, Wichita, Kans.

The recent decision of the Commission in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941), shows the same condition existing at certain stock yards not mentioned in the evidence in this case. The Commission there points out that the Jersey City Stock Yards Company operates a *public* stock yard in Jersey City, N. J., and states, at page 259:

"The stockyard company also notifies consignees of arrival of shipments, preserves the identity of each consignment, *delivers stock to consignee* or on floating equipment, obtains receipts therefor, collects transportation charges, handles loss and damage claims, assumes all responsibility therefor, weighs stock if requested, and performs all clerical work in connection with such services. It also orders cars, checks weights, routes shipments, and prepares freight bills on prepaid shipments. For these services the railroads pay the stockyard company $2.75 per car, except on outbound shipments. This charge is published in tariffs on file with us."

This practice was not disapproved by the Commission in said decision.

The same decision of the Commission shows that a similar practice obtains in connection with the West Philadelphia Stock Yard Company which operates the only public stock yards at Philadelphia, Pa. (p. 250) and the Union Stock Yard & Market Company, Inc., which operates the only public stock yards in New York, N. Y. (p. 268).

This evidence should be sufficient to show that there has been no settled interpretation with respect to egress by the packers, the railroads, or the stock yards. Furthermore the Commission itself required egress without additional charge in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641; stated that the shipper was entitled to such a delivery in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705; and construed the law as requiring egress without payment of yardage charges in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

Very clearly the evidence to which reference has been made, as well as the decisions cited, shows that there has been no settled interpretation of this point by the packers, producers, stock yard companies, or the railroads.

XI.

The District Court Erred in Failing to Find That the Contract of July 1, 1891 (Which Expired in 1906) Created No Tri-Party Relation Between the Stock Yards, the Railroads, and Appellants; That the Railroad Defendants Were Not Parties to Said Contract; That Said Contract Related Solely to Stock Yard Services; That the Question of Mere Egress from Railroad Unloading Pens to a Public Street Was Not Involved in Said Contract; That Said Contract Throws No Light Upon Whether Section 15 (5) of the Interstate Commerce Act Amended Section 1 (3) of That Act or the Law of the Covington Case; That Appellants Are Not Estopped to Obtain the Relief Sought in This Proceeding by Reason of Said Contract; and That, If the Union Stock Yard and Transit Company Was Ever the Agent of Appellants for the Receipt from the Railroads of Appellants' Shipments of Live Stock to Chicago, That Agency Was Ended by Appellants' Notices to the Railroad Defendants of May 9, 1933, May 16, 1933, and September 9, 1935, as Specified in Assignments of Error Nos. 20, 21, and 22.

Reference is here made to that portion of the decision of the Commission (R. pp. 41-45) commencing with the first paragraph on page 185 and continuing through the second paragraph on page 188.

A finding by the District Court in conformity with the language used in this caption was specifically requested (R. pp. 86, 87, proposed findings Nos. 13, 14, 15), but none was made.

Entirely aside from the law of the case, the Commission here finds a ground for dismissal of the complaint because of a certain contract between appellant (Swift and Company) and others and the Chicago Junction Railways and Union Stock Yards Company, effective as of July 1, 1891, which expired July 1, 1906. The origin of the controversy which led to the contract is somewhat vague. Whatever it may have been, it appears that certain packing companies in Chicago acquired property known as the Central Stock Yards, near the property of the present stock yard company, for the purpose of establishing a stock yards of their

own. They were, however, unable to obtain delivery of live stock at the Central Stock Yards because the Chicago Junction Railways, owned by the Union Stock Yards Company, which then considered itself a purely local carrier not subject to the *Interstate Commerce Act*, and which was the only railroad reaching either the Union Stock Yards or Central Stock Yards, refused to deliver live stock to the Central Stock Yards.

Suits had been commenced in the Chicago courts for the purpose of requiring the Chicago Junction Railways to make such delivery. See exhibits 49-58, inclusive. The dispute was compromised by the contracts which are in evidence as exhibits 47 and 48.

Exhibit 47, printed at page 101 of the appendix to this brief, is the contract then made between the Chicago Junction Railways and Union Stock Yards Company and the Armour, Morris, and Swift interests.

Exhibit 48 is a similar contract made at the same time between the Chicago Junction Railways and Union Stock Yards Company and twelve smaller packing concerns then operating at or near the Union Stock Yards.

In substance those contracts provided that the Union Stock Yards Company would purchase part of the tract of land in Indiana theretofore acquired by certain packers and the property known as the Central Stock Yards in Chicago; that the Union Stock Yards Company issue to the packers named in exhibits 47 and 48 certain income bonds, dated July 1, 1891 and payable as to principal on or before July 1, 1907, with interest payable semi-annually each year. The packers parties to the contract agreed on their part, *for the term of fifteen years*, to bring all of their live stock to the Union Stock Yards and to "use the said yards, and pay the usual yardage charges therefor." *The contract related solely to stock yard services.* The packers also agreed that, so

long as the stock yards company should conduct the business of a general stock yards in Chicago, the packers would not "establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock."

Appellants contend that the Commission erred in giving any weight to these ancient contracts, principally for the following reasons:

1. At the effective date of the contracts described in the decision (July 1, 1891) conditions, including statutory provisions, were so different that it is not clear that appellants' predecessors had any remedy for their grievances other than to move their plants from the Union Stock Yards or to enter into the compromise contract.

2. The Commission attempts to apply the doctrine of estoppel based upon a contract made in 1891 and which expired in 1906, but the doctrine is not applicable under the circumstances of this case or under the statutes involved.

ERROR IN FINDING IN COMMISSION'S REPORT.

The Commission states (decision, p. 188, R. p. 45):

> "* * * the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, *and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.*"

The error of the Commission in this finding is apparent from paragraph Eighth of exhibit 47 (appendix to brief, p. 110). The agreement of the packing companies was not for an unlimited period never to receive live stock in Chicago other than at the Union Stock Yards, but, on the contrary, was not to "establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever, in any stock yards in said city for the

receipt and use of their own live stock." The Commission's error is self-evident.

DISTINCTION BETWEEN STOCK YARD SERVICE COVERED BY THE CONTRACT AND EGRESS FROM RAILROAD CARS.

We hope that the court will not confuse the question of *yardage charges for stock yard services*, the sole matter with which the contracts were concerned, with the question of *mere egress from a railroad unloading pen to a public street*. The yardage charge referred to in the contracts was for stock yard services. It includes the service by the stock yards, while it has custody of the live stock, of at least the following items.

1. Furnishing by the stock yards of facilities for receiving, buying, or selling live stock on a commission basis;
2. Feeding;
3. Watering;
4. Holding;
5. Delivery to a purchaser or to an outbound railroad.
6. Weighing; and
7. Handling.

It goes without saying that, if appellants desire a stock yard service, they must pay the stock yard charge in the tariff filed with the Secretary of Agriculture, just as they paid the stock yard charges prior to the enactment of the *Packers and Stockyards Act, 1921*. It is a fact, and necessarily so, that the railroads, to quote the Commission's decision (p. 188, R. p. 45), "have no voice in the nature of the yards services provided or in the manner in which they are performed." Under the conditions contemplated in the 1891 contract, and followed for fifteen years as a result of that contract, the packers who were parties to the contract were obtaining separately two distinct services, *one service from the railroad* in transporting live stock to the property of the yard company and *another service from the yard*

company, strictly a stock yard service, of caring for and providing storage for animals until appellants were ready to take them into their packing plants. The question of a *mere egress* to the street was not the subject of the 1891 or of any other contract, arrangement, or agreement.

What did happen after the lapse of many years after expiration of the 1891 contract in 1906 was that appellants demanded, *not from the yard company*, but *from the railroads*, egress from the railroad unloading pens to a public street.

Prior to 1933 appellants were not prepared to make such a demand. One of the reasons was that they did not have their own scales for weighing the live stock, and weighing was one of the *stock yard* services described in the stock yard tariff. This matter of weighing was the controlling question in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. The Commission there said (p. 706):

> "No additional charge is made if the livestock is removed by consignees from the unloading pens before it is *weighed*, but when it is taken from the unloading pens, is *weighed*, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied."

The Commission also held that the complainant was entitled to obtain his live stock from the railroad unloading pens at the stock yards without any additional charge provided he did not require stock yard services. Inasmuch as the shipper in the *Kahn case* did request stock yard services, such as have been described above at Chicago, but could obtain his live stock without any such charge if he did not request stock yard services, the Commission held that he had no just ground for complaint.

The decision in the *Kahn case* was made April 10, 1933. Inasmuch as appellants did not at that time have their own weighing facilities, under that decision they were not

in position to discontinue the stock yard services theretofore provided by the stock yard company. Immediately thereafter appellants proceeded to install their own weighing facilities. The Commission has so found (decision, p. 184, R. p. 41):

> "It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees."

Having changed their facilities so as to come within the decision of the Commission in the *Kahn case* (192 I. C. C. 705) appellants made their demand for egress and this was the first time in their history that they were able to do so.

It should be noted that the long history of former transactions, stated at pages 185-187 of the Commission's decision (R. pp. 41-45), *does not relate to a demand for egress from railroad cars.*

The compromise reached between the packers and the stock yard company (at that time owner not only of the stock yards but also of the Chicago Junction) amounted in substance to an understanding that appellants and the other packers, large and small, would for a period of fifteen years bring their shipments into the Union Stock Yards, use and pay for its stock yard service.

IF THE UNION STOCK YARD AND TRANSIT COMPANY WAS EVER THE AGENT OF APPELLANTS FOR THE DELIVERY OF LIVE STOCK, THAT AGENCY WAS DEFINITELY ENDED BY THE NOTICES OF APPELLANT (SWIFT AND COMPANY) TO THE RAILROAD DEFENDANTS IN 1933.

The protests lodged with the railroad defendants against the collection of yardage charges for mere egress are set forth at length in exhibit 2 and at pages 59-74 of the appendix to this brief. If over a period of years appellants

had constituted the Union Stock Yard and Transit Company their agent to accept delivery of their live stock from the railroad defendants, those protests put the railroad defendants upon notice that such agency of the stock yard company to receive appellants' shipments, and furnish a stock yard service in connection therewith, was ended. Attention is called specifically to the paragraph in appellant's (Swift and Company) letters of May 16, 1933, to the various line haul carriers reaching Chicago, reading as follows:

> "You are hereby notified that on and after May 25, 1933, the Union Stock Yard & Transit Company of Chicago, Illinois, has no authority, *after unloading such livestock as your agent*, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, *as our agent, for our account, or in our name*. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois, *as your agent for unloading and delivery to us*) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account and will be made purely in mitigation of damages."

Shortly prior to this notice to the railroads the Commission had made the following finding in its decision in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, 709 (April 10, 1933):

> "The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and *taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease.*"

The foregoing notice to the railroads was based upon said decision of the Commission. Unless appellants are forever estopped from obtaining the live stock delivery required by the statutes and decisions of the courts, this notice was adequate to end any agency on the part of the Union Stock Yard and Transit Company and to advise the railroad defendants that they would be required to conform to their lawful obligations in connection with the shipments here involved.

THE COMMISSION ERRED AS A MATTER OF LAW IN ITS APPLICATION OF THE DOCTRINE OF ESTOPPEL.

The Commission erred as a matter of law in adopting the doctrine of estoppel based upon the 1891-1906 contract. Where the action sounds in tort as it does in this case (see *Adams* v. *Mills*, 286 U. S. 397, 76 L. ed. 1184) the party is never estopped from claiming damages for a tort simply because he waived his claim as to previous similar torts. It is now thirty-five years since the *expiration* of this contract. If ancient agreements prevented remedial action by the Commission, regardless of changed conditions, the Commission could have made few orders changing rates, prohibiting unfair practices, or eliminating undue prejudice, because in practically every case it could have been made to appear that the violation of law was long continued, or for a certain period was agreed upon by the interested parties. The decisions of this court squarely deny the doctrine of estoppel as applied to the right of a shipper or receiver of freight to obtain compliance with the provisions of the statute merely because a practice has long continued in effect.

In *Interstate Com. Com.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319, one of the defenses urged by the carriers against the order of the Commission was that the team track switching charge had been maintained

for a number of years and was therefore reasonable. The court in answer to this contention stated (p. 313):

> "The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. * * * If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, *they were in no way estopped from bringing the matter before the body created by law to deal with such questions, and from securing its order directing the carriers to stop the objectionable practice.*"

Dealing with a somewhat similar contention of the carriers in *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 75 L. ed. 672, at page 759, the court said:

> "Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. *A failure to enforce the law does not change it.*"

To the same effect is the decision of the Supreme Court in *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 75 L. ed. 1227, where the court said at page 511:

> "Where a forbidden discrimination is made, *the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity.*"

IN FAIRNESS THE COMMISSION SHOULD HAVE CONTINUED THE FACTUAL HISTORY TO DATE, IN ORDER TO SHOW THE CHANGED CONDITIONS AS TO THE STOCK YARDS OWNERSHIP.

The Commission merely sets forth certain evidence concerning contracts made by appellant (Swift and Company) and certain other packers, effective as of *July 1, 1891*, and certain evidence presented before the Federal Trade Commission and summarized by it in its *twenty-three year old report*, dated June 28, 1919. So far as appellants' owner-

ship of or interest in public stock yards is concerned, it would have been only fair for the Commission, having commenced the story, to have finished it, to the extent that it was shown in evidence. This evidence may be briefly summarized as follows:

The Supreme Court of the District of Columbia entered a consent decree on February 27, 1920, that is, in the year following the Federal Trade Commission report, which enjoined the defendants there named (including Swift and Company) from owning any interest in any public stock yard company and contained certain provisions as to the time and manner within which the owners of such stock yard interests should divest themselves of such ownership. The Consent Decree is lengthy. A certified copy of the entire decree was offered in evidence before the Commission as exhibit 62.

Exhibit 74 is a copy of a petition of the Swift defendants to the court, setting forth their stock ownership and proposing a plan under which the stock should be deposited with a trustee to be named by the court.

Exhibit 75 is an order of the court approving the plan for disposition of the stock yards set forth in exhibit 74.

Exhibit 76 is a farther order dealing with the powers of the trustee of the stock, etc.

Exhibit 77 is an order of the court approving the sale of the Swift and Company stock, then held by Harry S. New as trustee, to United Stock Yards Corporation. The order itself shows that it was approved by the Department of Justice.

Exhibit 71 is a prospectus issued by the United Stock Yards Corporation, showing the purchase by it of the shares of capital stock in various stock yards theretofore owned by Swift and Company or its nominees or trustees.

NO SWIFT INTEREST IN UNION STOCK YARDS.

It would also have been only fair on the part of the Commission to state, in accordance with the undisputed evidence, that Swift and Company had no direct or indirect financial interest in The Union Stock Yard and Transit Company of Chicago after the expiration of the fifteen-year contract, effective as of July 1, 1891 (R. pp. 723-729).

In this connection it should be remarked that the contract of July 1, 1891 throws no light upon the question whether section 15 (5) amended the law of the *Covington case* and section 1 (3) of the *Interstate Commerce Act.*

THE CONTRACT OF 1891 CREATED NO TRI-PARTY RELATION BETWEEN THE STOCK YARD COMPANY, THE RAILROAD DEFENDANTS, AND APPELLANTS.

In considering the 1891-1906 contract, to which the Commission apparently gives controlling weight, we ask the court to keep in mind the following facts:

There was no "tri-party relation" as indicated by the Circuit Court of Appeals in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, 918. The Commission emphasizes the fact that the railroad companies were not parties to the agreement and that the packers deemed the question of yardage charges not to be an unreasonable practice *on the part of the railroad companies* and to be a matter in which the railroads were not in any way concerned.

The Commission simply fails to note the difference between (1) a yardage service furnished by a stock yard at the request of appellants and (2) egress from the carriers' unloading pens. The yardage charge was and is for a stock yard service of holding, watering, feeding, weighing, etc. Naturally the railroads did not and could not have any interest in the collection of a *yardage* charge for

stock yard services, nor could they then or now be required to pay a *yardage* charge for stock yard services.

With such a service the railroads were not then and are not now concerned. If at the present time appellants should desire a *stock yard* service, they certainly could not expect the railroads to pay for it. In view of the fact that *stock yard services* only were involved in the contract, it is evident why the railroads were not interested therein nor a party to the contract.

The only "relation" was one established for fifteen years between certain small and large packers and the stock yard company. The *railroad* defendants in this case were not parties to that contract, and it cannot have any effect upon the *railroad duty* to afford egress for shipments of live stock from the *railroad* unloading pens. The duty of a railroad to deliver freight is a matter of common law and statutory provisions, not a matter of private contract.

Stock yard services, which were the only subject matter of the 1891-1906 contract, are something entirely different and, so far as regulation goes, since 1921 have been subject to a different statute, under the jurisdiction of the Secretary of Agriculture.

CONCLUSION WITH RESPECT TO CONTRACT OF 1891.

The decision of the Commission (third paragraph, p. 185, R. p. 42) shows that counsel for appellants objected to the receipt of the evidence here involved; thereafter moved that the evidence be stricken; and that the Commission overruled these motions.

The ground for these motions was that the evidence is all immaterial because the present rights of appellants cannot be determined by transactions which took place fifty years ago, prior to the present laws regulating railroads

, and stock yards, such as the *Elkins Act* of 1903, the *Hepburn Act* of 1906, the *Transportation Act* of 1920, and the *Packers and Stockyards Act, 1921.*

The prayer of the complaint was that the Commission issue an order under which appellants "may obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways, and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago" (R. p. 33).

If this is a right possessed by appellants, it is a right conferred by law and cannot be denied upon the theory of estoppel under a contract of 1891. It does not depend upon voluntary transactions of appellants or the Yard Company in 1891 or 1892. *Likewise, if it is a lawful right, it is a right not only of these appellants but of any receiver of direct shipments of live stock at Chicago and, for that matter, at any point in the United States.* The conclusion of the Commission would determine a general rule applicable throughout the entire United States as to all receivers of live stock because of a contract between specified private parties effective only from 1891 to 1906 at a single stock yard. For this reason, the immateriality of this evidence and of the findings by the Commission are obvious.

XII.

The District Court Erred in Failing to Find That the Issues in the Present Case Are Not the Same as Those Which Were Before the Interstate Commerce Commission in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, Which Was Reviewed by This Court in Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 79 L. Ed. 1382, as Specified in Assignment of Error No. 18.

A specific finding by the District Court in accordance with the caption of this chapter was requested by appellants (R. p. 84), but none was made.

Appellants assert that the Commission erred in the findings set forth in paragraph 15 of the complaint in the District Court (R. pp. 10-12), which are taken from pages 181, 189-190, 191, and 196 of the Commission's decision (R. pp. 36, 46-47, and 54, 55). The gist of the Commission's findings is expressed in the following sentence (p. 196):

> "There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding."

The decision referred to by the Commission is *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553. The Commission's order in that case was set aside by this court in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382. The parts of the Commission's decision quoted in paragraph 15 of the complaint in the District Court (R. pp. 10-12) hold in substance that the issues in this case and in the *Hygrade case* are identical; that the alleged difference is not one of substance; and that, upon authority of the decision of this court in the *Atchison case*, the complaint must be dismissed.

Appellants contend that the issues in this case are so essentially different from those in the *Hygrade case* that

the decision in the *Atchison case* did not justify dismissal by the Commission of appellants' complaint.

Here again it may be noted that this court, in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, at page 219, cites the decision in the *Atchison case* as sustaining the doctrine of the *Covington case*, under the terms of the *Interstate Commerce Act*, including section 15 (5). In contrast, the Commission holds that the same decision (*Atchison case*) abolishes the rule of law as to delivery of live stock stated in the *Covington case*.

THE ISSUES ARE DIFFERENT.

The issues in the *Hygrade case* are stated by this court as follows (295 U. S. 193, 200, 79 L. ed. 1382, 1389):

> "The Hygrade Company did not seek and the Commission did not grant relief *upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant.* * * * Consignee also sought free use of the Yard Company's properties including the overhead runway to take its animals from holding pens *as well as from unloading pens to its plant.*"

Contrasted with these issues in the *Hygrade case*, as stated by this court, the prayer of the complaint to the Commission (R. p. 33) is that complainants "*be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yards and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges.*"

"Our contention is sustained by the Circuit Court of Appeals for the seventh circuit."

After stating the issues, this court added (p. 201):

> "Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

In the present case appellants are not seeking a route over the property of the stockyard company, to their plant, but merely an egress to the street. Appellants are here asking only the relief which this court indicated was *not* sought by Hygrade and are clearly within the exceptions stated in the decision.

The decision of this court in the *Atchison case* was limited strictly to the shipments there involved. It *did not deny the Commission the right to make an appropriate*

---

* In the recent decision of the Circuit Court of Appeals in *Armour & Co. v. Alton R. Co.*, 111 F. (2d) 913, 916, the court said:

> "However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens, was set aside. *Hygrade case, supra*, 295 U. S. 193, 55 S. Ct. 748, 79 L. ed. 1382. The Court was impressed by the consignee's constant use of certain property of the Yards Company, namely, 'A route via the overhead runway to the Hygrade plant,' and concluded that there was no evidence that in removing the animals from the unloading pens, the consignee used only an egress to the city streets. However the Court recognized that 'Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways.'
>
> "In this connection, it is material to quote briefly: 'The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant. * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *.' *Atchison Ry. case, supra*, 295 U. S. at page 200, 55 S. Ct. at page 752, 79 L. Ed. 1382. *It is to be noted that in the instant case plaintiff has borne these words in mind.*
>
> "In a recent opinion the Supreme Court said of the Atchison or Hygrade decision that 'There the Commission's order * * * was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.' *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, 60 S. Ct. 193, 196, 84 L. ed. 198."

To appropriate the words of the Circuit Court of Appeals, in the instant case before the Commission "plaintiff has borne these words in mind". Appellants have not asked for the use of viaducts, runways, scales, and a tunnel, but only for egress to the street.

order, but reversed the decision solely and finally because the Commission had not made definite and specific findings of fact.

We now have the benefit of the construction placed by this court itself upon its own decision in the *Atchison case*. This is in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, where the court said (p. 219):

> "That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra* (286 U. S. 409, 76 L. ed. 1192, 52 S. Ct. 589) and also in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, 55 S. Ct. 748, *supra* (*Hygrade case*). There the Commission's order directing the discontinuance of appellant's yardage charge to consignees was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish."

It is respectfully submitted that the issues, as presented by the pleadings and evidence in the present case, are substantially different from those in the *Hygrade case*. It is also apparent that the order in the *Hygrade case was reversed because of the lack of adequate and definite findings by the Commission*. This court in no way closed the door to relief by the Commission upon proper issues.

FACTUAL DIFFERENCES BETWEEN PRESENT CASE AND HYGRADE CASE.

The Commission not only finds that the issues are not different from those in the *Hygrade case* but also states that factually there is no substantial difference. The Commission says (p. 191 of decision, R. p. 48):

> "The evidence here conclusively shows that there is no essential difference between the routes and the

services required from the unloading pens to plants outside the stock yards and a way out to the public highways. In either case, property of the yard company must be used."

In this statement the Commission is plainly in error. We turn to the decision of this court for a statement of the facts in the *Hygrade case*. Referring to the shipments of which the Hygrade Company had taken possession at the unloading pens this court said (p. 196):

> "The others are by it taken from the unloading pens and *driven through ways or alleys within the extensive yards properties over scales, where for the purpose of computing freight charges they are weighed*, to and along *an elevated runway* over pens in the yards and the tracks of the Junction Railway, *thence to and through a tunnel, under the proposed extension of Pershing Road* (located along what was formerly a part of the Chicago River) *ending at the Hygrade Company's plant which abuts on that highway.*"

It should be noted that in the present case, and the Commission so finds, there is no necessity for taking the live stock from the unloading pens and driving it "through ways or alleys within the extensive yard properties *over scales.*" Likewise, since no route of egress was suggested by the railroad defendants, there is no evidence to support a finding as to what facilities would be necessary, if the route most convenient to the railroads were used. The Commission squarely contradicts its own finding by the following finding (p. 184 of decision, R. pp. 40, 41):

> "All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. *It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau*, an agency of defendants, on its own property where the weighing is done by complainant's employees. *Complainant does not request or desire that*

any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

"Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge."

Certainly this is a substantial factual difference between what is sought by appellants in this case and what was sought by complainant in the Hygrade case, as is shown by the decision of this court and the finding of the Commission.

In the *Atchison (Hygrade) case* this court said "Transportation does not include delivery within the Hygrade plant" (295 U. S. 193, 201, 79 L. ed. 1382, 1389). The court also pointed out in the quotation from its decision on page 80 that the delivery there sought involved the use of a tunnel "under the proposed extension of Pershing Road (located along what was formerly a part of the Chicago River) ending at the Hygrade Company's plant which abuts on that highway."

At the time of the hearing in the present case the Hygrade plant had been closed for some time and the tunnel to the plant had been dismantled. It must be obvious that appellants could not and would not use a tunnel running into the basement of the Hygrade plant in order to reach a public street nor has any such delivery been sought.

POSSIBLE MEANS OF EGRESS.

In this connection reference should be had to the maps which are exhibits 1 and 20 and to the testimony before the Commission. Egress from the unloading pens to Packers Avenue would involve a movement of not more

than 40 to 50 feet beyond the western end of the unloading pens over vacant ground and would not require the use of any viaducts, runways, or tunnels (R. p. 363).

Again, if the court will examine the same maps and pages 372-375 of the transcript (R. pp. 357-359), it will find that an egress to a street is available from the *east end of the unloading pens by merely crossing a bridge over Halsted Street.* After crossing this bridge the live stock will come out on a public alley by which it can be moved to appellants' property. *This would involve no use of the stock yard facilities to the east of the unloading pens.*

To summarize, this court held that the Hygrade Food Products Corporation was using *ways and alleys within the extensive yard properties to scales* where the live stock was weighed, to and along an elevated runway over pens in the yards and tracks of the Junction Railway, *thence to and through a tunnel owned by the stock yard company which ended at the Hygrade plant.*

There is no better way of showing railroad delivery than to prove that the consignee, at a given time and place, took possession of and *thereafter* entirely dominated and controlled the movement of the property (as did the Hygrade Food Products Corporation) selecting the route to be followed, using the stock yard scales, etc.

This is what Hygrade did and what appellants have *not* sought in their notices to the carriers in 1933, 1935 or in their complaint.

THE COMMISSION ERRED IN ITS CONSTRUCTION OF THIS COURT'S DECISION CONCERNING EGRESS AT PUBLIC STOCK YARDS.

In appellants' brief before the Commission they referred to the following language of this court in the *Atchison case* (p. 201):

"Plainly there is an essential difference between the

route from unloading pens to consignee's plant and a mere way out to the public highways."

The Commission comments upon this reference as follows (decision, p. 191, R. p. 48):

"In the statement referred to by complainant, the court was contrasting the situation *at public stock yards* with the situation at live stock terminals *other than public stock yards*, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street."

There is nothing in the sentence quoted from this court's decision to indicate that the court was contrasting the situation at a *public stock yards* with the situation at a *private stock yards*.

Furthermore since the decision in the *Hygrade (Atchison) case* the court has clarified that decision and placed its own construction upon the language used. We refer to that portion of the decision in *Union Stock Yard & T. Co. v. United States*, 308 U. S. 213, 84 L. ed. 198, 205, quoted at pages 16-18 herein, where the court held that the law in the *Covington Stock Yards case* (139 U. S. 128, 35 L. ed. 73) is still the law of the land *as applied to a delivery at the Chicago public stock yards*. The same conclusion was also reached by the Circuit Court of Appeals in *Armour & Co. v. Alton R. Co.*, 111 F. (2d) 913. (See portion of said decision quoted at pages 19-21 herein.)

It is respectfully submitted that the Commission and the District Court erred in finding that there is no difference between the issues in the *Hygrade case* and the issues in this proceeding; and that there are no substantial factual differences.

XIII.

The Decision in Armour & Co. v. Alton R. Co., 312 U. S. 195, 85 L. Ed. 771, Does Not Affect the Present Case Except to Indicate That the Commission Has the Jurisdiction Which It Disclaimed.

THE ONLY POINT DECIDED IN THE ARMOUR CASE WAS THE QUESTION OF PRIMARY JURISDICTION.

That the only question decided by the court in the *Armour case* was that of primary jurisdiction is stated in the first paragraph of that decision where the court said (p. 196):

> "The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion."

The sole application of this portion of the decision to the case at bar is to establish that appellants in the case at bar initiated their complaint before the proper tribunal.

THE COURT DID NOT, IN THE ARMOUR DECISION, PLACE THE PRESENT CASE BEYOND THE CONFINES OF JUDICIAL REVIEW.

In the District Court it was contended on behalf of the railroad defendants that the court had placed the present case beyond judicial review by the following language in the *Armour decision* (p. 200):

> "*First.* At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, *under all circumstances and conditions and in all cases.*"

To conclude that this statement by the court placed the issues in this case beyond the scope of judicial review would be to admit that the Commission may decide non-factual

issues arbitrarily by mere administrative fiat. Properly considered, the foregoing statement by the court in the *Armour decision* is entirely correct. It is only too well settled that the duty of a carrier as to delivery may vary, dependent upon the conditions relating to the particular traffic.

1. In some cases delivery of ordinary dead freight on a carrier's team tracks is an adequate and lawful delivery.

2. In other cases delivery of ordinary dead freight upon a private side track, maintained by an industry, may be substituted for delivery on public team tracks. *Interstate Com. Com.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319.

3. Delivery on an interchange track, belonging to an industry having an intricate series of industry tracks serving points within its plant, may be substituted for delivery at a particular spotting point within the industry where the plant operations prevent the carrier from making a delivery in the plant at its convenience. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186.

These illustrations are perhaps sufficient to show that no single statement of law can be said to mark the boundary of the carriers' duty *under all circumstances and in all cases*. That duty may vary with the scope of the carrier's employment, the terms of the bill of lading, the facilities provided by the carrier, the nature of the commodity transported, etc.

It is not believed that the court intended to suggest that all decisions have been reversed and that the question of what constitutes a lawful delivery is now left solely to administrative caprice. No such contention was made on behalf of the United States and the Commission in the District Court.

THE DECISION IN THE ARMOUR CASE DEFINITELY SETTLES THE POINT THAT THE COMMISSION HAS, AND THEREFORE SHOULD EXERCISE, THE JURISDICTION WHICH IT DISCLAIMED IN THE PRESENT CASE.

That the Commission has, and therefore should exercise, the jurisdiction which it has disclaimed in this case would appear to be definitely settled by the following statement of this court in the *Armour decision* (pp. 200, 201):

> "*Second.* * * * If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

THE COMMISSION HAS JURISDICTION TO READJUST RATE SCHEDULES AND SHOULD DO SO IN A PROPER CASE.

The next reason stated by this court in the *Armour decision* for dismissing the complaint in that case without prior resort to the Commission is as follows (p. 201):

> "*Third.* * * * A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules."

The plain inference is, of course, that a court may not change a railroad company's rate schedules. The Commission, however, was established by law to do that precise thing under proper conditions. As we have pointed out in earlier chapters, it would not necessarily *reduce* the carriers' rates, because a reasonable fee for egress could be added to the freight rate. There is no contention here,

nor was there before the Commission, that the railroads should provide stock yard services.

As to reparation upon past shipments, due to the damage caused appellants by failure of the railroads to afford egress, that is a matter which the Commission would have to determine, if the case is returned to it for reconsideration within the principles of law announced by this court.

THE QUESTION OF PROVISION OF ADDITIONAL TERMINAL FACILITIES BY THE RAILROAD DEFENDANTS IS NOT INVOLVED IN THE PRESENT CASE.

As the fourth ground for dismissing the Armour complaint, without prior adjudication by the Commission, this court stated (p. 201):

> "*Fourth.* If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary."

No such question is involved in the present issues. The terminal facilities are those which the carriers now use under lease. It is not suggested that additional terminal facilities should be provided by the carriers or that they should acquire additional property. The sole question is whether appellants should be afforded egress through the present facilities, either at the present line haul rates or at such rates plus a reasonable additional fee for egress, if necessary.

A DECISION BY THE COMMISSION OF APPELLANTS' COMPLAINT UPON THE MERITS WOULD NOT RESULT IN ANY DISCRIMINATION AS BETWEEN SHIPPERS.

The fifth ground for dismissal of the Armour complaint was stated by this court as follows (pp. 201, 202):

> "*Fifth.* The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make."

It is, of course, the function of the Commission in a proper case to readjust rate schedules. So far as the future is concerned, if this case should be decided by the Commission in accordance with the prayer of the complaint, it would uniformly benefit alike all persons who receive direct shipments of live stock at Chicago. Whether reparation should be awarded for the past is a matter of which the Commission has exclusive primary jurisdiction. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553.

The Commission has power to establish a reasonable rate regulation or practice for the future without awarding reparation for the past. *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055.

THE QUESTION OF STATION AREA IS NOT INVOLVED IN THE PRESENT CASE.

The sixth ground stated by this court for dismissal of the *Armour case* without prior resort to the Commission is as follows (p. 202):

> "*Sixth.* The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission."

No such question is involved in the pending case. The station area is not in dispute. It consists only of the pens and chutes rented by the railroad defendants from the stock yard company for unloading and delivery of shipments of live stock transported to Chicago.

CLEARLY THIS COURT DID NOT INTEND TO PASS UPON THE MERITS OF THE PRESENT CASE IN THE ARMOUR DECISION.

It is apparent that this court did not decide the *Armour case* on the merits and that it did not foreclose a decision upon the merits in the present case. The present case had been decided by the Commission before the *Armour case* was argued and apparently the decision of the Commission was before the court at that time. The court carefully refrained from expressing any opinion on the merits, as witness the only reference it makes to the *Swift case* before the Commission in the *Armour decision* (p. 202):

> "The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary

prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits."

Armour and Company brought its complaint in court. The District Court (27 F. Supp. 625), the Circuit Court of Appeals (111 F. (2d) 913), and this court all held that the complaint was one which must be considered initially by the Commission.

Swift and Company brought its complaint before the Commission and now asserts that the Commission decided the case upon erroneous principles of law, the principal facts being undisputed.

There is no suggestion in the decision of this court in the *Armour case* that the decision of the Commission in the *Swift case* may not be presented to the court for judicial review, or that errors of law may not be corrected. In fact the decision of this court in the *Armour case* is inferentially at least that Swift adopted the proper procedure by seeking first an administrative investigation of the facts and a ruling thereon which could be reviewed by the courts for alleged errors of law.

XIV.

The District Court Erred in Adopting as Its Own Certain Findings of the Commission and in Holding That Said Findings Were Sufficient in Law and in Fact to Sustain the Order of the Commission, as More Fully Specified in Assignments of Error Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42.

The foregoing caption is paragraph 13 of appellants' statement of points to be relied upon.

The District Court in substance adopted as its own the various findings of the Commission, and its error in so doing was set forth in the assignments of error as indi-

cated in the foregoing caption. The errors of law alleged by appellants have been fully argued heretofore. It would be a mere repetition to present those alleged errors again under the affirmative findings made by the District Court as to which error is alleged in appellants' assignments. It should therefore be understood that this point is not waived, but specific argument is not presented under it for the reason that the controlling points have already been adequately presented.

Conclusion.

Appellants contend that this court should find that the Commission and the District Court erred in their construction of the law applicable to the facts of this case; and that the complaint should be remanded to the Commission for further procedure "within the framework of its own discretionary authority" on the correct principles as indicated by this court, in accordance with the prayer of the complaint in the District Court.

All of which is respectfully submitted.

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,
Counsel for Appellants.

January 21, 1942.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPENDIX TO APPELLANTS' BRIEF.

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January 21, 1942.

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(NOTE: In this appendix, the emphasis indicated by italics is supplied by counsel. The reference "R. p. ....." refers to the page number of the printed record in this court. Where reference is made to exhibit numbers, the numbers are those given to the exhibits in the hearings before the Commission. These exhibits were certified to this court separately from the record and have not been printed on this appeal, except as certain portions thereof are to be found in this appendix.)

STATUTES CITED.

INTERSTATE COMMERCE ACT, PART I.

(U. S. C. A. Tit. 49, § 1).

SECTION 1, PARAGRAPHS (3) (a) AND (4).

"(3) (a) The term 'common carrier' as used in this part shall include all pipe-line companies; express

companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this part it shall be held to mean 'common carrier.' The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'person' as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof."

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and

to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

SECTION 6, PARAGRAPHS (1) AND (7).

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The pro-

visions of this section shall apply to all traffic, transportation, and facilities defined in this part."

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privilegs or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

SECTION 9.

"Sec. 9 (*As amended August 9, 1935.*) (*U. S. Code, title 49, sec. 9.*) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such

corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

SECTION 15, PARAGRAPH (5).

"(5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

PACKERS AND STOCKYARDS ACT, 1921.

(U. S. C. A. Tit. 7, § 201(b))

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

(U. S. C. A. Tit. 7, § 226)

"Sec. 406 (a) Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce

Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

JUDICIAL CODE AND JUDICIARY.

(U. S. C. A. Tit. 28).

SECTION 41, SUBSECTION (27).

"§ 41, subd. (27) *Enforcement of orders of Interstate Commerce Commission.* Twenty-seventh. Of all cases for the enforcement of any order of the Interstate Commerce Commission."

SECTION 41, SUBSECTION (28).

"§ 41, subd. (28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

SECTION 43.

"§ 43. *Venue of suits relating to orders of Interstate Commerce Commission.* The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be

construed as meaning final destination of such shipment."

SECTION 44.

"§ 44. *Procedure in certain cases under interstate commerce laws; service of processes of court.* The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States."

SECTION 45.

"§ 45. (Judicial Code, section 209.) *District courts; practice and procedure in certain cases.* The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of

the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court."

SECTION 45a.

"§ 45a. (Judicial Code, sections 212, 213, amended.) *Special attorneys; participation by Interstate Commerce Commission; intervention.* The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto

of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

SECTION 46.

"§ 46. (Judicial Code, section 208.) *Suits to enjoin orders of Interstate Commerce Commission to be against United States.* Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's

order pending the final hearing and determination of the suit."

SECTION 47.

"§ 47. *Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or

suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

SECTION 47a.

"§ 47a. (Judicial Code, section 210.) *Appeal to Supreme Court from final decree; time for taking; priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice

of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

SECTION 48.

"§ 48. (Judicial Code, section 211.) *Suits to be against United States; intervention by United States.* All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

INTERSTATE COMMERCE COMMISSION.

No. 18490.

Allied Packers, Incorporated, *et al.* v. Atchison, Topeka & Santa Fe Railway Company, *et al.*

Submitted February 13, 1929. Decided March 10, 1930.

Upon reargument finding in former report, 144 I. C. C. 377, that certain charges for handling livestock at Buffalo stockyards, Buffalo, N. Y., were not subject to the jurisdiction of the commission, reversed. Such charges found illegal and unreasonable. Reparation awarded. Appearances same as in former report.

REPORT OF THE COMMISSION ON REARGUMENT.

ATCHISON, *Commissioner*:

In the former report herein, 144 I. C. C. 377, division 2 found that certain charges collected from complainants for handling their livestock at the Buffalo stockyards, Buffalo, N. Y., were not subject to the jurisdiction of the commission, and dismissed the complaint. Upon petition of complainants, the case was reopened and reargument had.

Complainants, the Allied Packers, Incorporated, and its subsidiary, the Klinck Packing Company, Incorporated, operate a packing house at Buffalo. They allege that the unloading charges collected at the Buffalo stockyards, hereinafter referred to as the stockyards, on numerous carloads of livestock, principally hogs, from several interstate points to Buffalo were unreasonable and inapplicable. The freight rates on the livestock from points of origin to Buffalo are not in issue. Reparation is asked.

The stockyards are at East Buffalo, N. Y., and are owned and operated by the New York Central. They are not a legal corporate entity. They consist of 96 unloading chutes and several pens for storing livestock, and are connected by an overhead enclosed runway with complainants' plant. The unloading of the stock from the cars into the chutes, thence to the storage pens when necessary, is performed by the stockyard employees, who are also employees of the New York Central. Until December, 1919, the date the Klinck Packing Company was purchased by the Allied Packers, Incorporated, the former purchased most of its livestock in the stockyards, and, to facilitate the handling of the stock, the overhead runway referred to was built by the New York Central across its tracks, and the public street between the stockyards and complainants' property, with the understanding that the Klinck Packing Company would buy a large portion of its livestock in the stockyards market. Upon the acquisition of the Klinck Packing Company by the Allied Packers Incorporated, the latter immediately began to receive large quantities of livestock from outside points and purchased only a small portion of its requirements in the stockyards. These direct consignments of livestock were delivered through the stockyards at the freight rates from points of origin to Buffalo. The handling of such shipments interfered with the handling of livestock consigned for sale at the stockyards market, and resulted in the stockyards' employees rendering service in handling livestock not consigned to that market but directly consigned to complainants at Buffalo. Under these circumstances two free unloading chutes were constructed by the New York Central at the stockyards and the charges assailed were published and filed with the Department of Agriculture effective December 3, 1922. Subsequent to that date such charges in addition to the freight rates were collected on complainants' shipments handled through the stockyards in the usual manner. Com-

plainants objected to the assessment of the charges and paid them under protest. This situation continued until January, 1925, when complainants built unloading chutes on their own property where they have since been receiving direct consignments of livestock. The complaint herein was originally received April 24, 1926.

The tariff naming the charges assailed is published in purported compliance with the packers and stockyards act, 1921, in accordance with instructions given by the Secretary of Agriculture. It is not on file with this commission. A copy of this tariff was furnished complainants early in 1923. The section publishing the charges assailed reads as follows:

> The following charges will be collected for each 24-hour period or fraction thereof that the stock remains in the Buffalo Stock Yards on all livestock not weighed or offered for sale which is unloaded, stored or delivered to consignees, or delivered from outside the stockyards to loading chutes for loading out.
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> |---|---|
> | Cattle | 10 cents |
> | Calves | 5 cents |
> | Hogs | 3 cents |
> | Sheep or goats | 2 cents |
> | Horses | 10 cents |

In finding that this commission is without jurisdiction of the charges assailed, division 2 based its conclusion on four main grounds: (1) That after defendants had provided free unloading facilities for direct consignments complainants could not demand as a matter of legal right that they be accorded delivery through the stockyards with the extra accommodation without paying for the extra service; (2) that under the method of delivery employed defendants were rendering a service in excess of their legal obligation and that the elimination of that service did not curtail the service of transportation but connected delivery with unloading without any intervening service; (3) that section 15 (5) required defendants to unload complainants' ship-

ments into suitable pens, but not to drive them through the chutes and overhead runway to complainants' plant, without additional compensation; and (4) that the transportation ended when the stock was unloaded into the chutes or storage pens and that thereafter it was subject to the provisions of the packers and stockyards act, 1921.

Under section 1 (1), the interstate commerce act applies to common carriers engaged in the transportation of passengers or property by railroad. Paragraph (3) of the same section defines the term "railroad" as including all terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery, storage, and handling of property transported.

The shipments here considered were unloaded from the cars into the unloading chutes by the stockyards employees, who were also employees of the New York Central. In some instances delivery was immediately taken by complainants' employees who drove the stock through the yards across the overhead runway to complainants' plant. In other instances the stock was removed by the stockyards employees to storage pens, and from there driven by complainants' employees to the plant.

No charge was made for unloading the stock into the unloading chutes. It is admitted by defendants that this service, which is performed by the stockyards' employees, is subject to our jurisdiction. Clearly this is so.

The charges assailed, labeled storage charges, cover the service of furnishing the chutes, pens, driveways, and runways necessary to receive the stock at the unloading point and take it from that point out of the stockyards. They

were assessed even when complainants' employees were waiting and ready to receive the stock at the time of its arrival and unloading from the cars, and when the unloading and driving of the stock through the stockyards was, as far as practicable, one continuous movement and transaction.

The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession. *North Penn. Railroad* v. *Commercial B'k.*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Service Commission*, 265 U. S. 70. This service inheres in every transportation.

With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported.

The building of the so-called free-delivery chutes prior to the assessment of the charges assailed has had no effect upon the method of handling livestock at the stockyards. As far as this record indicates the free chutes have never been used either by complainants or any other shipper. For years prior to December 3, 1922, the stockyards were clearly a terminal facility of the New York Central furnished under that carrier's duty to provide suitable means for receiving livestock offered to it for shipment and for discharging livestock after it reaches the place to which it

is consigned. These facilities were furnished the Klinck Packing Company for years, and the Allied Packers, Incorporated, made similar use of them since its purchase of the plant in 1919. By custom or practice a place of delivery other than a regular station may become a station at which the full responsibility of a carrier attaches. *Charnock* v. *Texas & Pacific Ry. Co.*, 194 U. S. 432. *A fortiori* a carrier can not change into a special facility what has become by custom its regular station facility by merely going through the form of establishing its regular station at another point. The mere assessment of a charge for the use of the stockyard facilities can not operate to deprive us of jurisdiction. No change whatever was made in the tariffs on file with us. There is ample support in the record for the finding that the stockyards had been for years and were during the period covered by this complaint terminal facilities of the New York Central when used to effect delivery of direct consignments of livestock.

With respect to the claim of defendants that notice was given to complainants of the availability of the free-delivery chutes, the record is in hopeless conflict. Defendants do not claim to have given written notice, and the evidence respecting the alleged oral notice is far from convincing. Nor can it be said that defendants have established the adequacy of the free-delivery chutes, in the face of the showing of complainants that such chutes could not have accommodated the volume of complainants' business and that deliveries there would, at least at times, have been impracticable.

Complainants point out that section 15 (5) applies to shipments destined to or received at public stockyards, and expressly provides that its terms shall not be construed to affect the duty of carriers of performing service as to shipments other than those to or from public stockyards. They therefore contend that, inasmuch as the shipments under consideration were consigned not to the stockyards but to

complainants' plant the provisions of that paragraph have no application. We are not prepared to accept such a restricted interpretation of the paragraph in question.

The previous report cites with approval *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. In that case division 1 considered the question of the jurisdiction of this commission over yardage charges on shipments of horses, mules, burros, and asses, delivered to dealers through the public stockyards in North Fort Worth, Tex. In several particulars the situation there differed materially from that here presented. The line-haul carriers there did not directly serve the stockyards but shipments were handled to and from the stockyards by a belt railway. The belt railway was not a defendant in that case. The stockyards company at North Fort Worth was a separate corporate entity, totally independent of the trunk lines. The line-haul carriers had adequate and accessible facilities regularly established where delivery of the shipments could have been made without a charge for yardage.

In finding the yardage charges not subject to our jurisdiction the report in the case cited relies to some extent on the provisions of section 15 (5), which reads as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the

transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

In discussing the effect of the enactment of this paragraph the report in that case states, at page 737:

> The amendment defines transportation as including "delivery * * * into suitable pens," and under the rules of statutory construction must be given effect over the general definition contained in section 1 in the case of carload shipments of ordinary livestock destined to public stockyards. Complainants admit that the unloading pens considered are suitable pens within the meaning of the amendment. The question therefore is whether section 15, paragraph (5), is complied with by delivery of the livestock into such pens.
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> A careful reading of the amendment to section 15 in the light of prior and subsequent decisions dealing with questions closely related to that here presented leads to the conclusion that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards. It follows that this marks also the limit of our jurisdiction over such shipments.

The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction. The sense of the

paragraph is that the services named shall be performed at the carriers' expense without additional charge to the shipper.

The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. 25 *Ruling Case Law*, page 918.

The primary purpose of the packers and stockyards act, 1921, is to regulate the operations of packers, commission merchants, and stockyard owners in connection with the handling of livestock consigned for sale at primary markets, *Stafford* v. *Wallace*, 258 U. S. 495, 514. That act expressly states that its provisions shall not affect the power or jurisdiction of this commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within our power or jurisdiction. In considering the question of our jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, we stated in *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, at page 618:

> Bearing in mind that the two acts should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal agencies

entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision to be resolved in favor of the authority delegated in the older of the two statutes, we can see nothing in the provisions of the packers and stockyards act, 1921, which in any way limits or affects the jurisdiction of this commission previously conferred to regulate "all charges * * * for any service rendered or to be rendered in the transportation of passengers or property."

We find that the charges herein assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act.

In cases where a service is performed for which no charge is properly published we have jurisdiction to determine a reasonable charge for such service. *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90. But defendants have not, on this record, justified any charge in addition to the line-haul rates.

We accordingly find that the charges assailed are illegal and unreasonable. We further find that the shipments were made as described; that complainant, Allied Packers, Incorporated, paid and bore the charges thereon; that it was damaged thereby in the amount of the charges herein found illegal and unreasonable, and that it is entitled to reparation, with interest. That complainant should comply with Rule V of the Rules of Practice. The original complaint was received April 24, 1926, and covered only shipments delivery of which was taken at the unloading chutes immediately after unloading from the

cars. By amendment filed November 4, 1926, shipments as to which delivery was not immediately taken were added. It follows therefore that claims for reparation are barred where delivery took place prior to April 25, 1923, as to the first class of shipments, and prior to November 5, 1923, as to the second class. The parties should be careful to avoid the inclusion of barred shipments in the Rule V statement.

BRAINERD, *Commissioner*, concurring:

I understand that the majority are of the opinion that the line-haul rates charged included the delivery service here considered and that the additional charges assessed for that service were to the extent of such charges different and greater than the compensation provided by tariff and therefore illegal.

The majority include in their findings a determination that the rates charged were unreasonable but in my opinion there is no evidence on which to predicate such a finding. It is sufficient that the rates charged were in excess of those named in the tariffs published in accordance with the interstate commerce act. The additional charges exacted were technically overcharges and reparation therefore is in my opinion properly awarded.

CHAIRMAN MCMANAMY and COMMISSIONERS WOODLOCK and PORTER dissent. COMMISSIONERS LEE and TATE did not participate in the disposition of this case.

DECISION OF INTERSTATE COMMERCE COMMISSION IN HYGRADE FOOD PRODUCTS CORP. v. ATCHISON, T. & S. F. RY. CO., 195 I. C. C. 553. (ORDER VACATED IN ATCHISON, T. & S. F. R. CO. v. UNITED STATES, 295 U. S. 193, 79 L. ed. 1382.)

INTERSTATE COMMERCE COMMISSION.

No. 24375.

Hygrade Food Products Corporation *vs.* Atchison, Topeka & Santa Fe Railway Company *et al.*

Submitted January 25, 1933. Decided July 25, 1933.

1. Livestock, in carloads, consigned to complainant at the Union Stock Yards, Chicago, Ill., found not subject to yardage charges in instances where delivery was or is taken at the unloading pens. Reparation awarded.
2. Switching charge applicable to the placement for delivery of carloads of livestock at complainant's plant at Chicago not shown to be unreasonable or otherwise unlawful.

Cyril J. Curran for complainant.

J. N. Davis, D. P. Connell, P. F. Gault, Walter McFarland, E. Rigg, R. G. Raasch, Frank H. Towner, and *Luther M. Welter* for defendants.

Paul E. Blanchard, Ross Dean Rynder, and *William N. Strack* for interveners.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Exceptions were filed by complainant and defendants to the report proposed by the examiner, and the case was orally argued. Our conclusions differ somewhat from those recommended by him.

Complainant, a corporation, has a packing house on the rails of the Chicago Junction Railway near the public stockyards known as the Union Stock Yards at Chicago, Ill. By complaint filed March 19, 1931, as amended, it is alleged that for the delivery of carloads of livestock at these public yards certain yardage charges assessed in addition to the rates named in tariffs on file with us were and are inapplicable, that the imposition of these charges was and is unreasonable, that switching charges demanded for the placement of carloads of livestock at complainant's plant are inapplicable and if applicable are unreasonable, and that these charges were and are unjustly discriminatory, unduly prejudicial to complainant, and unduly preferential of the Omaha Packing Company, in Chicago, a competitor of complainant. Reparation and a lawful adjustment for the future are sought. The Omaha Packing Company intervened. Armour and Company intervened in support of the complaint. The term livestock as used herein embraces only animals intended for slaughter, such as cattle, hogs, and sheep.

Complainant's plant lies directly north of the unloading pens of the Union Stock Yards which are operated by the Union Stock Yard & Trans. Company. There is a connecting subway under a public highway through which livestock are driven from the yards to the plant. Complainant's plant is served only by the rails of the Chicago Junction. No livestock have ever moved by rail to or from the sidings at complainant's plant or to or from rails adjacent thereto. In addition to certain sidings used and needed for other freight, and which complainant does not suggest or offer for the receipt of livestock, there are two stub tracks near the western boundary of complainant's plant, now used for car storage, which were constructed about the year 1924. The capacity of each of these stubs is 10 or 12 cars. Complainant proposes the use of one of these stubs for the receipt of livestock.

There are now no facilities there for the unloading of livestock and no scales for weighing. Complainant contends that the charges of $2.70 and $1.35 per carload of livestock from the West and East, respectively, applicable to deliveries to "industries, chutes or sidings of the Union Stock Yard & Transit Company, at Union Stock Yards" apply to deliveries at its plant. This contention is without merit. The published switching charge applicable to the placement at complainant's plant of a carload of livestock is $12.

No sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction. The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make.

The Omaha Packing Company is an industry local to the rails of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington. This industry receives no shipments and buys no livestock through or at the Union Stock Yards. All livestock received by it by rail are placed by the Burlington and the actual unloading into pens and the hoof weighing of the animals is assumed by the industry itself. It is a subsidiary of Swift & Company. Swift & Company, the complainant, and all dealers in livestock in Chicago, other than the Omaha Packing Company, receive direct or buy after receipt by others all inbound livestock at the Union Stock Yards.

Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical. No carrier other than the Burlington delivers or places car-

load shipments of livestock at any private industry. Defendants have refused to provide for the delivery of livestock at complainant's plant at the rates and charges which apply on livestock delivered at the Union Stock Yards or at the plant of the Omaha Packing Company.

Defendants urge that, if plant delivery of livestock were made for this complainant, all other packing industries similarly situated on the Chicago Junction Railway would be entitled to like services and that if such services were attempted to be rendered generally, confusion and delay would result. While deliveries are made at the plant of the Omaha Packing Company without the assessment of a switching charge such as applies to deliveries at complainant's plant, there is no indication that transportation services, conditions, and circumstances connected with deliveries at complainant's plant would be substantially similar to those connected with deliveries at the plant of the Omaha Packing Company, and no facts of record lead to the conclusion that charges applicable to such services as may be performed in making deliveries at complainant's plant are unreasonable or that the differences in these charges are not warranted.

Yardage charges per animal are assessed on all shipments of livestock delivered at the Union Stock Yards, and have been assessed since the establishment of the yards. They now are per head of cattle 35 cents, calves 25 cents, hogs 12 cents, and sheep 8 cents, and these are the charges whether or not the animals are weighed. A schedule naming these charges is filed with the Department of Agriculture in purported compliance with the Packers and Stockyards Act, 1921, but has not been filed with us. Complainant contends that these charges are for transportation services and may not be assessed. The fact that certain services come within the term transportation as defined in section 1 of the Interstate Commerce Act, and the fact that

charges assessed for such services are not in any schedule on file with us are not of themselves sufficient reasons why no charges may be made therefor. *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 77 I. C. C. 90. Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon section 15, paragraph (5), of the act, which provides that:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, * * *.

Under this provision of the act which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock. The fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards. In *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, decided March 2, 1891, the Supreme Court of the United States said:

> So, when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and

such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

The same principle necessarily applies to the receiving of livestock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered. A carrier of livestock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellees had been permitted to use them, with-

out extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish.

A charge for the yardage of livestock after consignee has not taken advantage of any reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act. What constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned. At the Chicago Stock Yards 14,000,000 animals were unloaded in 1930. Those yards are the greatest livestock terminal and market in the world. The magnitude of the business done there demands a degree of promptitude in the receipt and removal of animals that is not generally essential. It is indicated that the method of handling livestock at these yards is efficient and generally productive of satisfactory results. Livestock is moved over the rails of the Chicago Junction to the unloading platforms of the Union Stock Yards by the line-haul crews. These platforms are provided with chutes or inclines connecting them with unloading pens which have capacities sufficient to hold any carload of livestock. The unloading is done by Stock Yards employees at the expense of the rail carriers and the average time of unloading is about 2 minutes to a carload. These unloading pens are not adapted for the prolonged holding of animals, or for their feeding, watering, and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. At the peak of receipts, livestock are removed from the unloading pens at frequent intervals measured in minutes, whereas, toward the last of the de-

liveries for the day, livestock may remain in the unloading pens for longer periods. Prompt handling is accomplished by the use of two groups of unloading pens. While one trainload of unloaded livestock is being removed from one group, another trainload is placed for unloading into another group. The first group then becomes available for the unloading of a third trainload.

As to about 15 percent of all shipments consigned to complainant it has taken delivery before the animals were placed in holding pens, and in such instances has driven them from the unloading pens over scales and across and through the ways provided by the stockyards company to complainant's pens and plant. It is asserted that such delivery can be taken as to over 90 percent of the shipments and it is not indicated that notice for that purpose is necessary. It does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired. There cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock, and the accomplishment of proper delivery to complainant. Complainant asserts that free delivery immediately upon arrival of livestock would be satisfactory but maintains that it is entitled also to free delivery at holding pens.

The fact that other freight is subject to storage or demurrage charges only after a lapse of considerable time is not a sufficient reason why a similar rule should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight.

Defendants point out that the assessment of yardage charges is the established practice at stockyards throughout the United States and has been the practice of the Chicago yards over 60 years. They argue that the purpose of section 15, paragraph 5, of the act was merely to provide

for the unloading of animals without extra charge. It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens. It appears that at some of the stockyards such delivery may be obtained without extra charge.

While we found in *Strauss & Adler* v. *New York Central R. Co.*, 188 I. C. C. 487, that under the provisions of section 15, paragraph (5), of the act and the 28-hour law, unloading en route is required "into properly equipped pens for rest, feed and water" without extra charge, prompt delivery of livestock to complainant at the Union Stock Yards does not require pens so equipped. If placement into such pens is desired, an extra charge therefor is not within the inhibition of section 15 that an extra charge may not be assessed.

We find that the assailed switching charge on carloads of livestock placed for delivery at complainant's plant is not shown to be unreasonable or otherwise unlawful.

We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens.

We further find that complainant paid charges found inapplicable, was damaged thereby in the amount paid, and is entitled to reparation in that amount with interest. Complainant should comply with rule V of the Rules of Practice.

EASTMAN, *Commissioner*, concurring in part:

With one exception, I concur in this report as far as it goes, but I do not believe that it goes far enough. My general position in regard to this matter was indicated in my dissenting expression in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, 710-711. It does not seem to me that the unloading pens in this instance permit of reasonable opportunity to accept delivery and remove the

livestock from the premises after notice of arrival, and hence that they are not in all respects "suitable" for delivery within the meaning of section 15 (5) of the Interstate Commerce Act.

The exception referred to above is that I do not believe that the doctrine is sound which was enunciated in *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90.

LEE, *Commissioner*, dissenting in part:

With that portion of the finding which deals with the assailed switching charge I am in accord, but I disagree with the conclusion of the majority to the effect that the yardage charges here assailed were inapplicable in instances where delivery was taken at the unloading pens. Shipments consigned to complainant at Union Stockyards are unloaded at the carrier's expense directly into unloading pens which are owned and maintained by the stockyards company. As stated by the majority there can be no reasonable doubt that these pens are suitable for the receipt of livestock and the accomplishment of proper delivery. Section 15 (5) of the Interstate Commerce Act provides, among other things that transportation of ordinary livestock destined to public stockyards shall include delivery into suitable pens without extra charge. As indicated the carriers bear the expense of unloading into these pens and delivery into suitable pens is, therefore, accomplished without extra charge. There is no provision in the act which required the carriers to do more. I am of the opinion, therefore, that we have no jurisdiction over the imposition of yardage charges on livestock after it has been delivered into the unloading pens at public stockyards. We have so held in two cases. See *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730; *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. It is true that in the latter case, decided as recently as April 10, 1933, by the entire Commission, con-

signees could remove their livestock from the stockyards without the payment of any charges other than the line-haul rates. Nevertheless the majority found that transportation of ordinary livestock, in carloads, to public stockyards ended when the animals were unloaded into suitable pens at such yards and that this marked the limit of our jurisdiction. The suitable pens were the unloading pens. Since we have no jurisdiction beyond the unloading point we have no concern with what occurs thereafter.

Consideration of the provisions of the Packers and Stockyards Act, 1921, strengthens the foregoing view. Under that act the Secretary of Agriculture is given jurisdiction over stockyard services at public stockyards, which services are defined as follows:

> The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.

When reporting to the House of Representatives the bill which later became the act referred to the chairman of the Committee on Agriculture said, in part:

> This bill proposes to give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith, * * * that is, the Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends: * * *.

This leaves no doubt as to the intention of Congress to avoid conflicting or overlapping jurisdiction on the part

of several Government agencies. But let us analyze the result under the majority findings as I understand them. As to livestock which is unloaded into the unloading pens and later placed in the so-called hold pens until such time as complainant is ready to remove them, our jurisdiction extends only up to the time the animals have been unloaded, and the Secretary of Agriculture has jurisdiction beyond that point, but where complainant is at the unloading pen and removes the animals direct therefrom, this Commission steps in and continues beyond the unloading pen, into the realm of jurisdiction expressly given by the statute to the Secretary of Agriculture. Clearly it was not the intent of Congress to bring about such a situation. In this connection it is worthy of mention that an investigation instituted by the Secretary of Agriculture, and still pending, includes within its scope all of the services performed and charges made by the stockyards company, except the loading and unloading services and charges.

In purported compliance with the Packers and Stockyards Act a schedule of the yardage charges here complained of is on file with the Department of Agriculture, but it has not been filed with us. These charges are collected and retained by the stockyards company, and no portion of such charges is received by the rail carriers, either directly or indirectly. All of the foregoing lends support to the view that although the stockyards company is the agent of the carriers for the purpose of unloading the livestock, at the time the livestock is unloaded into suitable pens, our jurisdiction ends. Why, then, should the carriers be compelled to pay as reparation awarded by us, money which they never received.

The stockyards company began operation in February 1865, and during the past 50 years no trunk-line railroad company has had any ownership interest in the company or any control over its affairs. At the present time no

company engaged in the operation of a railroad has any interest in the stockyards company. During the time this company has been in operation its business has grown to enormous proportions. Its present facilities enable it to set 350 cars of livestock for unloading at one time. The time required for unloading a car is approximately 2 minutes and the process of unloading is practically continuous. In the year 1930 the stockyards company unloaded 240,501 cars containing more than 14,000,000 animals and loaded out 48,501 cars. This brings me to another point which in my opinion merits consideration, namely, that Congress by the enactment of section 15 (5) in view of the tremendous volume of livestock moving through public stockyards, of which it must be presumed to have had knowledge, recognized that transportation to and from such yards had to be treated differently than ordinary freight. Manifestly, to permit every consignee to enter the stockyards and remove his shipment direct from the unloading pens would result in endless confusion, and seriously interfere with the successful operation of the stockyards. This principle was recognized by the Commission in connection with the unloading of livestock at Chicago as evidenced by the following language used by the Supreme Court in *Adams* v. *Mills*, 286 U. S. 397:

> The commission found that in view of the congested conditions in the Chicago stockyards and the great volume of traffic, it would have been physically impracticable, if not impossible, for the consignee themselves to unload their own shipments.

Does not the same impracticability and impossibility apply in connection with the consignees taking their livestock direct from the unloading pens?

The assessment of yardage charges has been the practice at these stockyards for over 60 years. Certain of the line-haul carriers maintain facilities for unloading live-

stock at points within the switching limits of Chicago other than the Union Stock Yards. At such points delivery can be taken without the payment of yardage charges. The magnitude of the business done at the Union Stock Yards indicates that shippers prefer to take delivery there even though such delivery necessitates the payment of a yardage charge. In this preference shippers are doubtless influenced by the superior services available at these yards and the advantages accruing from their proximity to the public markets. Among the many facilities furnished by the stockyards company is an elevated driveway through which complainant's livestock may be and is driven directly to its plant, which is separated from the stockyards by a public street. It is for the use of this and other facilities of the stockyards company that the charges complained of are assessed. In effect the majority conclude that these facilities and the elevated driveway must be furnished by the carriers as a part of the "transportation" which they are required to furnish, which term is defined in section 1 (3) as follows:

> The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The majority say in effect that section 15 (5) in no wise modified section 1 (3). In my opinion the specific provisions contained in section 15 (5) must be given effect over the general provisions contained in section 1 (3). Support for this view is found in the concluding sentence of section 15 (5) reading as follows:

> Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now ex-

isting by virtue of law respecting the transportation of other than ordinary livestock, *or the duty of performing service as to shipments other than those to or from public stockyards.*

The italicized portion clearly indicates an intention on the part of Congress to modify, and in my opinion it did modify, the services required of the carriers insofar as the duty of performing service on shipments of ordinary livestock to or from public stockyards was concerned. If this was not the case, manifestly the proviso in question is meaningless. Furthermore, since the term "transportation" in section 1 (3) includes storage, would not the carriers be required (if the majority view is sound) to hold livestock, where complainant was not at the unloading pens, in the so-called hold pens as a part of the transportation service until complainant was ready to receive the same? But the majority holds, and correctly so, that the holding of livestock in such hold pens is not a service of transportation.

As indicated, the line-haul carriers collected nothing in excess of the lawful tariff charges for the service they performed. Transportation over which we have jurisdiction ends when the livestock is unloaded into suitable pens. Admittedly the unloading pens are suitable pens. If complainant is of the view that the charges made for the use of the stockyards' facilities are unreasonable or otherwise improper, its remedy lies not with this Commission but with the Secretary of Agriculture. For these reasons the complaint should be dismissed.

I am authorized to say that COMMISSIONERS MEYER, PORTER, MAHAFFIE, and MILLER join in this expression.

ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN ITS BRIEF IN THIS COURT IN ATCHISON, T. & S. F. R. CO. v. UNITED STATES, TO THE EFFECT THAT THE ENACTMENT OF SECTION 15 (5) (FEB. 28, 1920) DID NOT REDUCE OR MODIFY THE JURISDICTION OF THE COMMISSION UNDER SECTION 1 (3) OR THE OBLIGATION OF RAILROAD CARRIERS WITH RESPECT TO THE DELIVERY OF LIVE STOCK AT PUBLIC STOCK YARDS.

In *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, the Interstate Commerce Commission filed in this court a brief (dated March, 1935) in which it argued (contrary to the decision here under review) that transportation of live stock to a public stock yard is not ended until the consignee has been afforded an opportunity to remove the stock from the carrier's possession and premises, and (contrary to the decision here under review) that section 15 (5) did not modify section 1 (3) and that the Commission's jurisdiction extends to and includes the delivery of live stock at public markets.

We quote below this argument from the Commission's said brief (at pp. 27-32 and pp. 51-59 (hereof):

"The Order in Question, Directing the Correction of a Practice Which Results in the Assessment of Extra Charges Found to Be Inapplicable, Yet Imposed and Collected Upon Interstate Shipments, Is Within the Jurisdiction and Authority of the Commission Under the Provisions of the Interstate Commerce Act.

(A) The Commission's Jurisdiction Is Co-Extensive With 'Transportation', as Defined in Section 1 (3) of the Act, Including All Services in Connection With the Delivery of Property Transported.

"As pointed out by Mr. Justice Harlan in the *Covington Stock Yards case*, 139 U. S. 128, 'when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading.' In other words, 'the duty

to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.'

"The carriers transporting livestock to Chicago have made such provision under an arrangement with the Union Stock Yards & Transit Co. As found by the Commission, the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make (R. 26). As shown later (section II, *infra*) this finding of fact is supported by precedent and substantial evidence in this proceeding.

"The Commission also found that the Union Stock Yards are public stockyards. (R. 26, 28.) *But their function as public stockyards is different both factually and legally from their function as the livestock terminal or depot of the railroads. In connection with the transportation of interstate shipments of livestock consigned to those yards as a mere place of delivery, the Yards function not as a public stockyard but as the agent of the carriers in providing the facilities through which the carriers make the deliveries which they are legally obligated to make.*

"The provisions of the Interstate Commerce Act and the jurisdiction of the Commission thereunder *apply to all services and charges in connection with such deliveries.* Under section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property, and under paragraph 3 of that section the term 'transportation' is given a special definition enlarging its ordinary meaning and causing it to embrace much more than the actual *movement* from origin to destination. It includes, among other things 'all services in connection with the * * * delivery * * * of property transported.'

"The term 'transportation' as defined in the Act has been construed by this Court in *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, *Southern Ry.* v. *Prescott*, 240 U. S. 632, and others, and these cases are here relevant because they make it clear that the Commission's jurisdiction is co-extensive with the *transportation* of interstate commerce as that term is enlarged by the statutory definition, attaching with the beginning of transportation as defined in the Act and ending only when the defined transportation terminates, because they hold that *delivery* is part of such transportation, and because they indicate when such delivery legally takes place.

"In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, Mr. Justice Pitney referred to the letter and policy of the Commerce Act, and especially the provision of the Hepburn amendment of 1906 which enlarged the definition of the term transportation. 'From this and other provisions of the Hepburn Act,' he said, 'it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like.'

"That case related to a shipment of household goods from Denver, Colo., on September 18, 1911, to Cleveland, Ohio, where they arrived September 27 but were not called for by the consignee, and remained in the possession of the carrier as warehouseman for over a month, when part of them were lost. It was held that the 'transportation' had not ended, in view of the definition of that term in the Commerce Act.

"In *Southern Ry.* v. *Prescott*, 240 U. S. 632 (1916), the Court, speaking through Mr. Justice Hughes, again

had occasion to refer to the Act's definition of transportation:

> By the Act to Regulate Commerce (section 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' It is made the duty of the carrier 'to provide * * * such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee'. And it is further provided, in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs'. The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act. (*Ibid.*, 637.)

"The Court then quoted with approval the above-quoted language from the *Dettlebach* case and added

that 'the terminal services incident to an interestate shipment are within the Federal Act, * * *.' It was held that the shipment there involved was still in the course of 'transportation' though the goods had arrived at destination, notice of the arrival had been given the consignee, the entire freight charges had been paid, the consignee had given a receipt for the goods, and part of them had been taken away from the freight station.

"See also *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43; *Atchison Ry. Co.* v. *United States*, 232 U. S. 199, 212; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 441; *Danciger* v. *Cooley*, 248 U. S. 319, 327.

"Under the above decisions it is clear that property shipped *remains under transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station;* in other words, delivery is not complete until the goods are removed from the carrier's possession and premises."

"Section 15 (5) of the Interstate Commerce Act, a remedial provision, is to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission.

"Section 15 (5) contains provisions in respect to the *charges* for the transportation by railroad of carload shipments of livestock destined to or received at public stockyards. The language of the provisions indicates that it has reference primarily to charges, by providing what shall be included in the transportation without extra charge. It provides that transportation wholly by railroad of ordinary livestock, in carload lots, destined to or received at public stockyards shall include three services 'without extra charge therefor to the shipper, consignee or owner,' namely, (a) all necessary service of unloading and reloading en route, (b) delivery at public stockyards of inbound shipments into suitable pens, (c) receipt and loading at such yards of outbound shipments.

"*There is nothing in the language that seems to narrow or restrict the Commission's jurisdiction,* but on the contrary it apparently enlarges that jurisdiction to the extent that under it, in connection with section 12 requiring the Commission to execute and enforce the provisions of the Act, and section 15 (1) authorizing the Commission to remove by order any violation of the Act, the Commission has the added jurisdiction to determine in any case whether an extra charge has been imposed in violation of its provisions, and in the case of inbound shipments to public stockyards, the suitability of the pen, and otherwise enforce the provision.

"The provision is remedial and would seem to be entitled to a liberal interpretation that fairly accomplishes its purpose. *New Haven R. R.* v. *Interstate Commerce Commission,* 200 U. S. 361, 391; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 72. Under it it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards 'into *suitable* pens.' *Under a liberal interpretation of the word 'suitability' it would seem that a pen from which it is impossible for a consignee, who has gone to whatever expense and trouble may be necessary to be right there on hand at the time of the unloading of his stock, to take his shipments without extra charge, cannot be a 'suitable' pen.* It might have four out of five elements of suitability. It might be safe, that is, there might be present no elements of danger, such as barbed wire. It might be bedded with straw, and it might be protected from the elements; *but it would still lack one absolute essential of suitability if the person who was a party to the transportation contract and who had taken the trouble to be right there when the train came in at whatever time of day or night, could not take his stock away from the pen without the payment of extra charges.* Such a pen would lack that much of being a suitable pen, and *there is nothing in this provision of the Act to indicate that the Congress meant to take away from transportation the time-honored element of opportunity to accept delivery.* The Commission has here held that it is not unreason-

able and not a violation of any provision of the Interstate Commerce Act to assess a charge where the stock had to be put into a holding pen until the consignee came to take. But in the case of the 15 per cent of the consignee's shipments as to which they have gone to the trouble to be there for the purpose of taking, and did take, *transportation did not cease until that opportunity to take was extended.* So long as that essential part of transportation continued, the Commission had jurisdiction and cannot escape the responsibility of acting under that jurisdiction. *If it be said that, in going out from the pen into which the livestock had been driven down from the railroad car, the stock passed over runways of the Stock Yards, by necessity of the method of construction of the Stock Yards, this could not alter the law.* This fact would emphasize the view that any such pen would not be suitable if there were an extra charge made for the passage of the livestock from the pen. Furthermore, if it be said that the stockyard facilities were a convenience to the shippers and receivers of livestock, it may be said with equal force that the stockyards were a convenience to the carriers. *They elected to make Union Stock Yards, Chicago, a station for the receipt and delivery of this character of freight, livestock, and published rates thereto,* and if the location of consignee's plant be said to be favorable, it may be presumed the favorability of that location was reflected in the purchase price he paid for the plant. If it is a favorable location the railroads are not concerned. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

"This same provision forbids the imposing of an extra charge for the receipt and loading at such stockyards of outbound shipments. How could livestock get into these pens without going over the roads or runways of the stockyards, any more than they could be taken out. If an outbound shipment were tendered at this station of the carriers, would they not have to receive and load without extra charge from these very pens?

"The Commission's report says the complainant did not allege that the yardage charges in issue were unreasonable if they may be lawfully applied and relied upon section 15 (5) of the Act. The complaint specifically alleged that the yardage charges are not carried in any tariff on file with the Commission and are consequently being collected without tariff authority (R. 20), and are therefore in violation of section 6 of the Interstate Commerce Act. It further alleged that the Yards Company operates public stockyards which are also operated as a depot of the railroads for the receipt and delivery of livestock at the station, Union Stock Yards; that such delivery is accomplished through the sidings, chutes and pens of the Yards Company, and that in accomplishing said deliveries that company is the agent of the railroads; that in respect of numerous carload shipments of livestock heretofore made complainant has directed that delivery be made to it at its own sidings and chutes, but defendant carriers have refused to make such delivery and have insisted that complainant take delivery through the chutes and pens of the Yards Company; that for these yardage charges neither the defendant carriers nor the Yards Company rendered any service over and above the necessary service in making delivery to complainant of its shipments of livestock as required by section 15 (5) of the Interstate Commerce Act; that the yardage charges purport to cover services rendered after transportation has been completed but that in fact, as applied to complainant's shipments, transportation is not completed until said livestock is delivered to complainant and placed in its control, and consequently said charges cover a portion of the interstate transportation services rendered. In view of these allegations it seems obvious the statement in the Commission's report above referred to means that the complainant did not allege that the yardage charges are unreasonable in instances in which yardage or other stockyards' services are actually rendered—for then and then only might the yardage charges be lawfully applied. It is obvious, too, that complainant did not rely solely

on section 15, paragraph 5, although under the above-suggested interpretation that paragraph alone would be sufficient, but aside from the statutory provisions relied upon by the complainant, the Commission could afford relief under any other provision of the Act which the established facts showed to be violated, *Chicago, Rock Island & Pacific Ry. v. United States*, 274 U. S. 29, 37.

"Appellants contend that section 15 (5) had the effect of limiting the Commission's jurisdiction, that under it the Commission no longer has jurisdiction over the entire transportation service, including delivery (*Dettlybach* case, *supra*, *Prescott* case, *supra*) but that the Commission's jurisdiction ends upon the unloading in the yards. They also contend that the provision reduces their common law duty to make delivery (*Covington* case, *supra*) and that under it their common carrier obligations end upon the unloading.

"In the *Allied Packers* case, *supra*, the Commission also carefully considered this jurisdictional question, and, *overruling the earlier decision of Division 2 in the same case and the decision of Division 1 in the Southwestern Horse & Mule* case, *supra*, held that section 15 (5) did not restrict its jurisdiction over 'transportation' as defined in section 1. It said, page 646:

> The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1; or to restrict our jurisdiction.

"It held that the charges assailed in so far as they were assessed for the use of the stockyards' facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act; and that it has jurisdiction to pass upon the *legality* and *reasonableness* of such charges. (Page 647). *It was there contended, as here, that section 15 (5) is a specific enactment defining transportation in so far as movements of ordinary livestock to public stockyards is concerned, and, being a later enactment than the general provision in section 1 (3), takes prec-*

edence over it." Rejecting this contention the Commission said:

> The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. 25 *Ruling Case Law*, page 918. (*Ibid.*, 646)

"This construction seems to be correct, in view of decisions of this Court indicating that each provision of the Interstate Commerce Act must be given a reasonable construction with a view to carrying out all the provisions of the Act. In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, Chief Justice White pointed out that every provision of the Act must be 'read in connection with the context of the Act' and that if 'the general terms of the section when taken alone might sanction' a construction destructive of certain rights conferred in other parts of the Act, the context must be considered and the general terms be so construed as to give full effect to the entire Act. 'The Act cannot be held to destroy itself.' In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567, Mr. Justice Brandeis said that the last paragraph of section 4 when read alone might compel a certain construction but that it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of section 4, and other sections in the Act to regulate Commerce de-

signed to prevent unjust discrimination. In *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 366, Mr. Justice Day said that 'while section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress.'

"In support of their contention respecting this jurisdictional question appellants rely largely on what they assert to be the history of section 15 (5). *But the history of that section indicates there was no intention to restrict the Commission's jurisdiction or to modify the common law duty of carriers to make delivery of livestock without extra charge for the mere delivery.* In view of the importance of the question a full history of that provision is here given."

ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN ATCHISON, T. & S. F. R. CO. v. UNITED STATES, TO THE EFFECT THAT THE LEGISLATIVE HISTORY OF SECTION 15 (5) DOES NOT INDICATE AN INTENTION TO EXEMPT LIVE STOCK FROM THE PROVISIONS OF SECTION 1 (3) AS TO DELIVERY AT PUBLIC STOCK YARDS.

In the same brief in *Atchison, T. & S. F. R. Co.* v. *United States, supra*, the Commission also argued (directly contrary to the decision here under review) that the legislative history of section 15 (5) indicated no intention to modify or repeal the provisions of section 1 (3) as to delivery of live stock at public markets.

We quote below this argument from the Commission's said brief (at pp. 59-69 thereof):

"History of Section 15 (5).

"Section 15 (5) was added to the Interstate Commerce Act by section 418 of Transportation Act, 1920 (41 Stat. 484, 486). Many of the important provisions of that Act were recommended by the Commission (see its 1918 and 1919 annual reports to Congress) but the provision enacted as section 15 (5) was not among its

recommendations. The original bill introduced by Congressman Esch on June 2, 1919 (H. R. 4378, 66th Cong. 1st Sess.), contained no provision bearing upon the subject matter of section 15 (5) as ultimately passed. Hearings on this bill were held before the House Committee on Interstate and Foreign Commerce during July, August, September, and October, 1919, and it was during the course of those hearings that the subject matter was first suggested. The suggestion came from Judge S. H. Cowan, Attorney for the American National Live Stock Association and the National Live Stock Shippers' League. Judge Cowan wrote to Congressman Esch asking for permission to present the views of the associations of livestock shippers. This letter, dated July 15, 1919, appears on pages 139-140 of Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 66th Cong., 1st Sess. on H. R. 4378.'

"With that letter was transmitted an 'outline of principal propositions pertaining to legislation which were adopted by the Executive Committee of the National Live Stock Shippers' League, Chicago, June 3, 1919.' Proposal No. 6 thereof was as follows:

> 6. Propose and urge that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards used at (as) market place which shall include unloading into suitable pens and delivery therein at such stockyards, where the animals may be counted and checked, including such facilities as are necessary or in use for making such delivery.

"On August 18, 1919, Judge Cowan appeared before the House Committee and testified at length in regard to the pending legislation. (Hearings, etc., *supra*, pages 845-892.) His statement in reference to proposal No. 6, above referred to, was as follows:

> Taking the case of live stock and confining myself to that, there is a habit or custom of railroads to divide up the charges. The shipper is only concerned in getting his live stock from the point where he loads it to the ultimate market; that is, unloading it into the stockyards and get-

ting it into the hands of the commission man who sells it. It is hard for him to know what ought to be the charges if they are to be segregated into a charge for this and a charge for that and the other. I think there ought to be a requirement that as to all public markets for live stock there shall be a through rate from point of origin to destination, including a delivery into the pens to the consignee or his agent; that the railroad company should have sufficient compensation for that, of course, goes without saying.

* * * * *

I am just speaking in behalf of live stock. I say that this idea of adding these little charges here and there is very pernicious and hits the shipper in the face where he can not help himself, and we ought to have to all public stockyards a flat through rate to pay for the service, because the shipper is getting just one thing. He gets his stock shipped from his farm to the place where it is sold. Whatever compensation the railroad ought to have let it have it, but let it have it for doing the one thing which to the shipper is a single proposition. He never sees any of it except it is deducted out of his account of sales.

I will prepare and submit to the committee a proviso to meet that requirement, which I think ought to be enacted, * * *. (*Ibid*, 874-875.)

"Later in his testimony Judge Cowan again adverted to this subject and stated:

Also with respect to the matter to which I have heretofore referred of one rate from point of origin to public stockyards that are denominated as terminals of the railroads, the depots, terminals, and public markets, there ought to be one rate just the same as if that stock pen actually belonged to the railroad. A railroad would not make two rates to its own pens if it owned and operated them, and neither should it do so with respect to pens which it uses in the same manner. There should be one fare, the same as a passenger

rate, to such depot as they use in a given city. I will submit a brief in connection with an amendment, which I will propose which will cover that point, and I will not take your time on that. (*Ibid.*, 881.)

"While the Senate bill dealing with the same subject matter (S. 3288) was under consideration, Senator Cummins, the author of the bill, on December 16, 1919, proposed the insertion of the following paragraphs as an amendment to section 15 of the Act to regulate commerce (59 Cong. Rec. 674):

> Through rates for transportation wholly by railroad shall be made for the entire ordinary transportation service from point of origin to the destination and delivery at the depots, warehouses, team tracks, or other usual unloading places; and in case of ordinary live stock destined to be received at public stockyards, to include the service of unloading and delivery of inbound shipment into suitable pens, and receipt and loading of outbound shipments; such to be deemed the carrier's facilities. This provision shall likewise apply to other than ordinary live stock destined to or received from such stockyards handled in the same manner, provided that where by reason of the extraordinary value of the animals or their condition it is reasonably necessary for their proper care and handling, such additional service as is reasonably necessary in properly caring for the same, the unloading and delivery or loading thereof may be required by the carrier of the shipper, which, if not furnished by him, shall be furnished by the carrier and reasonable charge made therefor against the shipper—all of which shall be carried in tariffs and subject to the determination of the Commission.
>
> Public stockyards are those used as facilities for handling live stock at places of sale, purchase and slaughtering, including those at which the Department of Agriculture maintains inspection of meat animals for slaughter, and such other places as

the Commission may find in common use for handling or buying and selling live stock by carloads, to be designated by the Commission.[6]

"Thereupon Senator Cummins stated the reasons for the amendment, as follows (59 Cong. Rec. 674):

Mr. Cummins: Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.

The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a live stock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a series of charges for various services performed in connection with the transportation of the live stock, so that the shipper does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to use the railroads in the shipment especially of live stock.

"6. There were a number of prints and reprints of several bills. H.R. 10453, as amended in the Senate, struck out all after the enacting clause and substituted an entirely new bill. The above-quoted amendment, proposed by Senator Cummins, appeared in the reprint of December 20, 1919, of H.R. 10453, as the fifth and sixth paragraphs of a proposed amendment to section 15 of the Act to Regulate Commerce, pages 179-180."

"The amendment was agreed to. (*Ibid.*)

"February 21, 1920, the conference report on the bill was read in the House. In conjunction with their report the House managers made the following statement (59 Cong. Rec. 3264):

> *Transportation of Live Stock*—
>
> (Section 418 of the conference bill.)
>
> Section 44 of the Senate amendment provided that through rates on live stock should include *unloading and other incidental charges* in the case of shipments consigned to public stockyards. The House bill contained no reference to this matter. The conference bill *amplifies* the provision of the Senate amendment and provides that 'transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge to the shipper,' with certain exceptions concerning which the commission may prescribe rules. (Italics supplied.)

"As so amplified the provision was agreed to by both Houses and enacted as paragraph numbered 5 of section 15.

"It thus appears the provision was not intended to be directed solely to loading and unloading charges but was much broader in its scope and embraced all extra charges of whatever nature in addition to the published tariff rate.

"Nor was there any thought of restricting the Commission's jurisdiction, but the purpose was to remedy by specific statutory enactment a practice regarded as an evil. It was the intention, clearly expressed by the author of the provision, 'to bring the whole subject within the jurisdiction of the Interstate Commerce Commission.' *Nor was there any thought or purpose of limiting the common carrier obligations of the railroads so that they would end upon the unloading of the stock into suitable pens.* The decision of this Court in the *Covington Stock Yards* case, holding that it was

the obligation of the carrier to receive live stock and carry it to its destination and there deliver it to the consignee without an extra charge, was called to the attention of the lawmakers, and the purpose of the enactment was to enforce the principle of that decision rather than reduce the common-carrier obligations as there expounded.

"It is true of course that in the great majority of instances the transportation of live stock to public stockyards does end upon the unloading of the animals into suitable pens, *because the great bulk of live stock shipments to public stockyards are intended for commission men and traders doing business in the yards. In such instances a stockyards' service is furnished* and when that is so the common-carrier transportation, and consequently the jurisdiction of this Commission, ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act begins. The decision of the Supreme Court of Missouri in *Burton* v. *Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the live stock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, *that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a live stock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege.* There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act *to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else.*"

ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN ITS BRIEF IN ATCHISON, T. & S. F. R. CO. v. UNITED STATES, TO THE EFFECT THAT NOTHING IN THE PACKERS AND STOCKYARDS ACT, 1921, NOR THE LEGISLATIVE HISTORY THEREOF, AFFECTS THE JURISDICTION OF THE COMMISSION UNDER THE INTERSTATE COMMERCE ACT.

In the same brief in *Atchison, T. & S. F. R. Co.* v. *United States, supra*, the Commission also argued (directly contrary to the decision here under review) that the *Packers and Stockyards Act, 1921*, and the legislative history thereof, indicated no intention to transfer from the Commission to the Secretary of Agriculture jurisdiction over the delivery of direct shipments of live stock at public stock yards in cases where no stock yard service, but only a delivery to the consignee, is desired.

We quote below this argument from the Commission's said brief (at pp. 48-51 thereof):

> **"Legislative History of Packers & Stockyards Act Discloses Intention Not to Restrict Jurisdiction of Commission.**
>
> "In support of their argument that the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture and not the Commission's, the appellants in No. 606 quote in part (brief, pp. 24-25) the statement of the Chairman of the House Committee on Agriculture (Congressman Haugen) at the time the bill which later became Packers & Stockyards Act, 1921, was under consideration. This statement was made orally upon the floor of the House, in explanation of the bill, and is here quoted in full:
>
> > It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce; that is, the Secretary shall have jurisdiction from the time the live stock is unloaded at the terminal yards and after it is

out of the jurisdiction of the Interstate Commerce Commission.

Up to the time of unloading the live stock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends; or, in other words, the Interstate Commerce Commission is to continue its exclusive jurisdiction over transportation rates and compelling the carriers to furnish refrigerator and stock cars, and so forth, and *the Secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of live stock and live stock products in interstate commerce,* subject, of course, to court review; * * *. (Congressional Record, 67th Congress, 1st Session, Vol. 61, Part 2, Page 1800.)

"The Congressman's statement as to the jurisdiction of the Commission seems correct as far as it goes, but was not necessarily intended to be a full, detailed, complete, or exhaustive statement of the Commission's jurisdiction. It is no doubt true that ordinarily the jurisdiction of the Commission over shipments of live stock to public stockyards ends with the unloading, because in the great majority of instances such live stock is consigned to commission men doing business at the yards, utilizing stockyards' facilities and services, and upon the unloading of their stock in the yards, transportation ends. *In several cases the Commission has denied its jurisdiction beyond the unloading in cases where the consignees have obtained stockyards services as distinguished from mere delivery service. Kahn* v. *B. & O.*, 192 I. C. C. 705; *Gobel* v. *B. & O.*, 200 I. C. C. 606. Apparently the Chairman of the Committee on Agriculture, in making his oral statement to the House, did not have in mind *instances in which, through arrangement with the railroads, the stockyards function.*

as the live stock terminal of the railroads, and did not have in mind at the moment the large number of authorities, including the decision of this court in the *Covington Stock Yards* case, that in such circumstances the consignee is entitled to delivery without the assessment of a special charge. Under the circumstances it seems that the Congressman's statement is not to be taken as conclusive, and as not binding upon this Court if it finds that under the provisions of the Interstate Commerce Act the Commission does have jurisdiction under the facts disclosed in the instant case.

"It may be added that in the written committee report (House Report No. 77, 67th Congress, 1st Session submitted by Mr. Haugen from the Committee on Agriculture) the only reference to the question of jurisdiction as between the Secretary of Agriculture and the Interstate Commerce Commission appears on the last page of the report (page 16), which states that section 406 of the bill, H. R. 6320, as favorably reported by the Committee,

> makes it clear that the Interstate Commerce Act (Commission) is not to be deprived of its existing jurisdiction over terminal railways in the stock yards *or over any other matter now subject to its control.* (Italics supplied.)"

This argument of the Commission in support of its own jurisdiction, rather than that of the Secretary of Agriculture, appears to have been affirmed and settled in favor of the Commission in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (pp. 200, 201):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, *it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission.*"

THE DEMANDS OF APPELLANTS UPON THE RAILROAD DEFENDANTS WHICH PRECEDED THE FILING OF THE COMPLAINT WITH THE COMMISSION DEFINITELY ENDED THE AGENCY OF THE STOCK YARD COMPANY TO RECEIVE APPELLANTS' SHIPMENTS AND FURNISH A STOCK YARD SERVICE.

In paragraph 11 of the complaint in the District Court (R. p. 5) appellants alleged that the Commission erred in the findings of fact appearing at pages 183-184 of its decision (R. pp. 39, 40) concerning the demands made by appellants prior to the filing of the complaint and the action of the railroad defendants upon those demands. It may be conceded that the summary statement made by the Commission is not substantially in error, but for a complete understanding of the transactions we set forth at length the facts of record upon this point.

In a decision in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705 (April 10, 1933), the Commission held (p. 709):

> "The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and *taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease.*"

The decision indicated that the Cincinnati Union Stock Yards (which was involved in that case) is a public stock yard (like that at Chicago) not owned or operated by the railroad carriers.

APPELLANT'S DEMANDS IN MAY, 1933, AND REPLIES THERETO.

Appellant (Swift and Company) considered this declaration of law by the Commission and on May 9, 1933, approximately one month after the decision of the Commission in the *Kahn case*, addressed identical letters to each

of the line haul railroad defendants reaching Chicago, reading as follows (exhibit 2, pp. 191-230):

"Numerous direct shipments of live stock are consigned via your line of railroad to Swift & Company, or its subsidiaries, at the Union Stock Yards, Chicago, Ill. By direct shipments are meant shipments in which Swift & Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract.

"When such shipments are delivered to Swift & Company or its subsidiaries through the facilities of the Union Stock Yard & Transit Company of Chicago, Swift & Company, up to this time, has been required to pay not only the transportation rate of your railroad to Union Stock Yards, Chicago, Ill., but, in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago; regardless of the fact that Swift & Company's employees may have performed the entire service rendered subsequent to the unloading of the live stock at the unloading chutes.

"Swift & Company is advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring Swift & Company to pay yardage charges to the Union Stock Yard & Transit Company of Chicago on such direct shipments, as to which no yardage service is desired or received. Swift & Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the live stock therefrom to its own plants without other use of the facilities of the Union Stock Yard & Transit Company of Chicago.

"In order that Swift & Company and its subsidiaries may not further be subjected to said yardage

charges of the Union Stock Yard & Transit Company upon such direct shipments, which it is advised are unlawful, this is to notify you that, on and after May 25, 1933, Swift & Company will be prepared to accept, at such reasonable and proper delivery pens of the carrier at Union Stock Yards, Chicago, all shipments of live stock consigned direct to Swift & Company or its subsidiaries at Union Stock Yards, Chicago, Ill., and to remove same within a reasonable time thereafter; and that on and after said date Swift & Company will refuse to pay to the carriers, or to the Union Stock Yard & Transit Company of Chicago, any yardage charge upon shipments of live stock so delivered by the carrier and so accepted and removed by Swift & Company and its subsidiaries and its or their employees at and from such reasonable and proper delivery pens of the carrier at Union Stock Yards, Chicago."

A copy of this letter was sent to The Union Stock Yards and Transit Company of Chicago on the same date with a letter to the stock yard company reading as follows (exhibit 2, p. 109):

"Kindly accept this as official notice that on and after May 25, 1933, we shall not pay yardage charges on direct shipments of live stock received or accepted by us in the manner outlined in said letter."

It should be remembered that The Union Stock Yard and Transit Company of Chicago had on file with the Commission a tariff (R. p. 181) naming loading and unloading charges, in which it designated itself as *carrier's agent*, and that the Commission has held that to the extent of this service it was and is a common carrier. *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198. Consequently this notice to it was not a notice merely to a *stock yards*, but to a *common carrier* acting as railroad defendant's *agent* in the delivery of live stock.

On May 10, 1933, the Union Stock Yard and Transit Com-

pany replied to appellant's said letter of May 9, 1933 as follows (exhibit 2, pp. 107-108):

"The Union Stock Yard and Transit Company of Chicago begs to acknowledge receipt of your favor of the ninth instant, which for purposes of your convenience we have symbolized as you symbolized your letter.

"This Company also acknowledges receipt of what purports to be a copy of a letter (symbolized as above) sent by you to various railroad officials in Chicago and elsewhere, dated as of the same date.

"On behalf of The Union Stock Yard and Transit Company of Chicago I beg to hereby formally advise you that the property of the Union Stock Yard and Transit Company of Chicago is its private property and that its tariffs are on file with properly constituted authorities.

"So long as Swift & Company route or permit or cause to be routed their shipments of live stock to themselves at the yards of this Company, the Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such live stock is released.

"We observe in your letter to the carriers that you say you are prepared to accept shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards.

"You hereby are notified that the carriers to which your letter purports to be addressed do not own or control any facilities or property at the yards of this Company which can be used either by consignees of live stock consigned to the yards of this Company or by the carriers, for the delivery of live stock after unloading, without the payment of the yardage charges imposed by this Company for the use thereof.

"Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit live stock consigned to you at its yards to be delivered to you or to your employees, on and after May 25, 1933."

On May 16, 1933, appellant (Swift and Company) addressed identical letters to the various line haul railroads reaching Chicago reading as follows (exhibit 2, pp. 149-188):

"As a matter of information, we furnished the Union Stock Yard & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9, 1933, concerning shipments of live stock consigned to us at Union Stock Yards Station, Chicago, Illinois. Please take notice of the matters stated in its response to us, dated May 10, 1933, copy of which is attached.

"You are hereby notified that on and after May 25, 1933, the Union Stock Yard & Transit Company of Chicago, Illinois, has no authority, after unloading such livestock as your agent, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, as our agent, for our account, or in our name. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois, as your agent for unloading and delivery to us) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account and will be made purely in mitigation of damages."

On May 16, 1933, appellant (Swift and Company) also addressed a letter to The Union Stock Yard and Transit Company of Chicago reading as follows (exhibit 2, pp. 189-190):

"Receipt is acknowledged of yours of May 10, in response to ours of May 9, enclosing copy of our letter of even date therewith to officials of various line haul carriers now publishing rates to, and making deliveries of live stock at, Union Stock Yards Station, Chicago, Illinois, as described in their respective tar-

iffs lawfully on file with the Interstate Commerce Commission.

"We have passed the information contained in your letter on to each of the respective line haul carriers, as per copy of letter attached hereto.

"You are hereby advised that any and all live stock which, on or after May 25, 1933, may be delivered to you by said carriers as their agent for unloading (as provided in your tariff No. 5, I. C. C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers (*or from you as their agent*) and promptly removed from your premises after such acceptance and receipt.

"You are further notified that as to such stock, we do not desire, and will not accept, receive, or pay for any service or use of facilities beyond the unloading pens which you provide for the carriers *as their agent.*

"You are further notified that on and after said date you have no authority to accept, handle, or receipt for such live stock, after unloading, and until delivery to us, as our agent, on our behalf, in our name or for our account.

"You are further advised that at the time such stock is delivered to you by said carriers as their agent, most of the said shipments will be in interstate commerce and will continue to be in interstate commerce until said contracts of carriage are fully performed by delivery of lading covered thereby to us, the consignee thereof. We will hold you strictly accountable for any interference therewith or for any delay in the prompt delivery thereof in accordance with said contracts for interstate carriage.

"Any payments which may be made by us to you on and after May 25, 1933, on such shipments, will be made under protest, solely for the carriers' account, and in mitigation of damages caused by the carriers' failure to make delivery of said stock to us as required by their respective contracts of lading covering such shipments."

In response to the letters to the railroads, appellant

(Swift and Company) received identical replies from the railroads, most of them dated May 19, 1933 and reading as follows (exhibit 2, pp. 111-A-148):

"I have your two letters of May 9, 1933 and May 16, 1933 relative to the assessment and collection of yardage charges on live stock consigned to you at Union Stock Yards, Chicago, Illinois.

"Pleased be advised that the yardage charges to which you refer in your letter of May 9 are not published in any tariff of this company and are not assessed or collected by it or for its account. Inasmuch as this company does not collect these charges from you directly or indirectly, does not receive any part of them and is not responsible for their collection, I do not see how any action can be taken by it. Your protest with respect to the charges should be directed to the party assessing and collecting them.

"In your letter of May 16, you state that on and after May 25, 1933, the Union Stock Yard & Transit Company will have no authority to accept or receipt for such live stock as your agent, and you also state that any delivery by this company of live stock consigned to you to the Union Stock Yard & Transit Company of Chicago, other than a delivery made as the Agent of this company for handling and delivery to you, will constitute a conversion of your property. These statements are apparently made under a misapprehension of fact. So far as I know, the Union Stock Yard & Transit Company of Chicago has never accepted or receipted for live stock consigned to you as your agent or for your account. Moreover, this company does not make delivery of live stock consigned to you to the Union Stock Yard & Transit Company of Chicago. On the contrary, such deliveries are made by this company in suitable pens at the Union Stock Yards at Chicago strictly in accordance with your instructions.

"If after May 25, 1933, you desire live stock consigned to you at Chicago, delivered at some point in Chicago other than the Union Stock Yards, please advise me."

On May 24, 1933, appellant (Swift and Company) ad-

dressed to The Union Stock Yard and Transit Company of Chicago a letter reading as follows (exhibit 2, p. 106):

> "Will you please refer to the correspondence that has passed between us with respect to the delivery of direct shipments of live stock consigned to this company at Union Stock Yards, Chicago, on and after May 25, 1933? As you were advised, we had planned to make a demand for delivery of such stock at the unloading pens as soon as the stock was unloaded and the right to promptly remove such stock without the payment of your yardage charges. In your letter to us of May 19, you advised that you would not permit such delivery of such stock without payment of your yardage charges, and that this refusal would be maintained in the event of a physical demand by our repsentatives for the delivery of such stock without the payment of such yardage charges. It is our understanding that, in view of your refusal to permit the removal of such stock from your premises without the payment of such yardage charges, it will be unnecessary for us to make such a demand. Please be advised that we are willing, from time to time on and after May 25, 1933, to pay your yardage charges on such stock if such charges are received by you as being paid under protest and in mitigation of damages, and also if it is understood that with respect to each and every of such shipments a physical demand for delivery and the right to remove such stock without payment of such yardage charges is considered as having been made and refused, and that such demand would actually have been made but for your advice that the same would be continuously refused."

On the same date the Union Stock Yard and Transit Company replied to said letter from appellant by a letter reading as follows (exhibit 2, p. 105):

> "I have your letter of May 24th referring to the correspondence between us with respect to the delivery of shipments of live stock consigned to your company at Union Stock Yards, Chicago, on and after May 25, 1933.
>
> "This company is willing to make a delivery of all

such shipments to you at the pens into which said shipments are unloaded from the cars, but you are correct in your understanding that the removal of said shipments from these pens over the property of this company will not be permitted unless you then pay the yardage charges or agree to pay them in the future.

"This company is willing, from time to time, to accept the payment of its yardage charges on such stock on and after May 25, 1933, with the understanding that such payments are made under protest and in mitigation of damages. It is also agreeable to us that it be understood that with respect to each and every of said shipments, a physical demand for delivery and for the right to promptly remove such stock without payment of such yardage charges is to be considered as having been made by you as soon as the stock is unloaded, and refused by this company, immediately after unloading, and that such demand would have actually been made but for our advice to you that the same would be continuously refused."

On May 31, 1933, appellant (Swift and Company) addressed identical letters to the various railroads entering Chicago reading as follows (exhibit 2, pp. 85-104):

"Attached hereto are copies of letters dated May 24, 1933, exchanged between Swift and Company and The Union Stock Yard and Transit Company of Chicago, with reference to the handling of direct shipments of live stock consigned to Swift and Company at Union Stock Yards, Chicago, Illinois, on and after May 25, 1933, and payment of yardage charges of The Union Stock Yard and Transit Company of Chicago on such shipments.

"You are advised that upon consideration we were of opinion that the damages resulting from your failure to make delivery of these direct shipments of live stock, without payment of yardage charges, as heretofore demanded by us in our letter of May 16, 1933, would be minimized to the greatest extent by our payment of such yardage charges under protest, for your account, as outlined in the attached correspondence.

"You will please be advised that the making of this arrangement was solely for the purpose of minimizing the damages resulting from your failure to make a lawful delivery of such live stock, and that by such an arrangement we do not waive any right or claim heretofore asserted in our previous correspondence on this subject."

In response to the letter from said appellant, dated May 31, 1933, the various railroads addressed to appellant identical letters, nearly all of which are dated June 12, 1933 and read as follows (exhibit 2, pp. 64-84):

"I have your letter of May 31, file A-26953, relating to the payment of yardage charges on direct shipments consigned to you at the Union Stock Yards, Chicago, with which you enclosed copies of letters interchanged between your company and the Union Stock Yard & Transit Company, under date of May 24, 1933.

"As I have heretofore advised you, this company has nothing whatever to do with the assesssment and collection of yardage charges at the Union Stock Yards, Chicago, upon direct shipments of live stock consigned to you at that point. Such charges are not published in any tariff of this company, are not assessed or collected by it, and it receives no part of them. Moreover, as I have also advised you, all direct shipments of live stock consigned to you at the Union Stock Yards, Chicago, and unloaded and delivered to you at that point, are so consigned and delivered upon your specific instructions to this company. The matter of yardage charges on such shipments, referred to in your letter of May 31, is a matter which lies entirely between you and the Union Stock Yard & Transit Company of Chicago and with respect to which you have the right to make any arrangements you wish. Since this company is not responsible for the assessment and collection of the yardage charges of which you complain, there is certainly no liability with this company because of their assessment and collection."

Thereafter appellant (Swift and Company) rendered

against each railroad bills covering the amount of the yardage charges assessed by the stock yards on shipments transported to Chicago by the particular railroads. Each of these bills was declined. Letters typical of those addressed by the railroads to appellant, declining to pay the bills for such yardage charges, are to be found at pages 48-63, inclusive, of exhibit 2.

APPELLANT'S FURTHER DEMANDS ON RAILROADS IN SEPTEMBER, 1935, AND REPLIES THERETO.

Appellant (Swift and Company) was an intervener in the proceeding before the Commission known as *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, in which the Commission entered an order requiring egress without extra charge. If the order of the Commission in that case had been sustained, substantially the relief demanded by appellant in the letters above quoted would have been afforded, and it would probably have been unnecessary for appellant later to bring an independent proceeding. The order of the Commission in that case, however, was vacated and set aside by the Supreme Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, the decision having been announced April 29, 1935. In that decision the Supreme Court said, amongst other things (pp. 200-201):

> "The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant. * * * *Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways.*"

Having considered this decision of the Supreme Court and entertaining some doubt as to whether the demands

made upon the carriers in 1933 exceeded the duties of the railroad carriers as indicated in said decision of the Supreme Court, appellant (Swift and Company) decided to make a further demand upon the railroads which would be clearly within the limitations stated by the Supreme Court. As a result of this consideration of the decision of the Supreme Court, on September 9, 1935 said appellant and certain other packing companies addressed identical letters to the Chicago railroads reading as follows (exhibit 2, pp. 40-45):

"Numerous direct shipments of live stock are consigned via your line of railroad to Swift & Company, Armour and Company, Wilson & Company, or the subsidiaries of each of them, at Union Stock Yards, Chicago, Ill., hereinafter collectively referred to as the 'packers'. By direct shipments are meant shipments in which the packers are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to delivery of such live stock under the transportation contract.

"When such shipments are delivered to the packers through the facilities of the Union Stock Yard & Transit Company of Chicago, the packers are required to pay not only the transportation rate of your company to Union Stock Yards, Chicago, Ill., but, in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago for the use of its facilities; regardless of the fact that the packers' employees may have performed or been ready and willing to perform the entire service necessary after unloading of the live stock at the unloading chutes.

"The packers are advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring them to pay yardage charges on such direct shipments.

"The packers are prepared to accept such shipments

at suitable delivery pens at the Union Stock Yards, Chicago, *and immediately to remove the live stock from such unloading pens to a public street by a proper and convenient means of access to the street to be designated by you, without other use of the property of the Union Stock Yard & Transit Company of Chicago.*

"It is appreciated that there is no other means of egress from your present unloading facilities to a public street except over the property of the Union Stock Yard & Transit Company of Chicago; that in order to effect deliveries in the manner to which the packers believe they are entitled, without payment of the present yardage charge, it will be necessary for you to make proper arrangements for the purpose of egress from the unloading pens to a public street with the Union Stock Yard & Transit Company. If, as a result of such arrangements, you should desire that we accept the live stock, without payment of yardage, at some reasonable and convenient point to be agreed upon between your company and the Union Stock Yard & Transit Company, other than the unloading pens, such an arrangement will be agreeable to the packers. It is also understood by us that, until such an arrangement with the Union Stock Yard & Transit Company is perfected by you and a means of egress or a convenient delivery point is designated, it will be necessary for us to pay the published yardage charges of the Union Stock Yard & Transit Company of Chicago upon such direct shipments.

"In order that the packers may not further be subjected to such yardage charges upon direct shipments, this is to notify you that, on and after September 20, 1935, the packers will be prepared to accept, at suitable delivery pens in the Union Stock Yards or at such other delivery point as may be agreed upon by negotiations between your company and the Union Stock Yard & Transit Company, all shipments of live stock consigned direct to the packers, at Union Stock Yards, Chicago, Ill., and to remove the same immediately thereafter from the delivery pens or the designated

delivery point. In the meantime, in order to obtain delivery of their live stock and to minimize the losses which would occur if they were denied delivery of their live stock, the packers will continue to pay the published yardage charges of the Union Stock Yard & Transit Company as set forth in its tariffs on file with the Secretary of Agriculture; but this is to notify you that such yardage charges will be paid by the packers for your account and that until the arrangement here sought is perfected and put into effect, the packers will promptly render against your company bills for such yardage charges and will use all lawful means to enforce collection of such charges from your company.

"To summarize, *this demand is merely for egress from the unloading pens used by your company at the Union Stock Yards, Chicago, to city streets or to such other reasonable and convenient delivery point as may be agreed upon by such convenient and reasonable route as may be designated by you or your company and the Union Stock Yard & Transit Company.*

"This identical letter is being sent today to the vice president in charge of traffic of each line haul carrier which brings live stock to the Union Stock Yards at Chicago.

"Kindly advise whether you will afford the facilities necessary to this method of delivery by you and acceptance by the packers of direct shipments of live stock, on and after the date above mentioned. For the purpose of facilitating early adjustment of this matter, the packers would appreciate meeting at the earliest possible date with you or with such a committee of the executive officers of the interested carriers as you may appoint. A prompt reply will be appreciated."

To this letter of September 9, 1935, the Chicago railroads made identical replies, most of which are dated September 17 or 18, 1935, reading as follows (exhibit 2, pp. 1-39):

"We have your joint letter of September 9th with

reference to yardage charges on direct shipments, in which letter you state that:

> 'On and after September 20, 1935, the packers will be prepared to accept at suitable delivery pens in the Union Stock Yards, or at such other delivery point as may be agreed upon by negotiation between your company and the Union Stock Yards and Transit Company, all shipments of live stock consigned direct to the packers at Union Stock Yards, Chicago, Illinois, and to remove the same immediately thereafter from the delivery pens or the designated delivery point.'

"You further state, in substance that you do not desire to pay the yardage charges published by the Union Stock Yard & Transit Company with the Secretary of Agriculture, on shipments destined to or received at public stock yards on your behalf, and that:

> 'The packers will continue to pay the published yardage charges of the Union Stock Yard & Transit Company as set forth in its tariffs on file with the Secretary of Agriculture; but this is to notify you that such yardage charges will be paid by the packers for your account and that until the arrangement here sought is perfected and put into effect, the packers will promptly render against your company bills for such yardage charges and will use all lawful means to enforce collection of such charges from your company.'

"Your letter is substantially similar in tenor and effect to letters of May 9th and May 16th, 1933, to which reply was transmitted on behalf of this company under date of May 19, 1933. There is therefore no need to discuss the situation further. It might be added, however, that this company has no power or authority over the yardage charges published and assessed by the Union Stock Yard & Transit Company which is a public utility subject to regulation in respect to its services and charges.

"Since the shipments referred to in your letter are destined to, or received at, a public stock yard, the services of a common carrier ceases when the shipments are unloaded into suitable pens and we cannot

accept in any form, responsibility for any charges thereafter made by the Union Stock Yard and Transit Company as a public stock yard.

"So long as you desire to continue the long established practice of insisting upon receipt of your direct shipments of live stock at the public stock yards, any dissatisfaction you may have with respect to either facilities or charges should be expressed to the Union Stock Yard and Transit Company which organization has the responsibility therefor."

Thereafter, and before the expiration of the two-year period of limitations, appellants filed their complaint before the Interstate Commerce Commission. That complaint was drafted after consideration of the decision of the Supreme Court in *Atchison, T. & S. F. R. Co.* v. *United States, supra.* The prayer of the complaint was that an order be entered requiring the railroad defendants to afford appellants delivery of their direct shipments of live stock to the Union Stock Yards, Chicago, Ill., "at reasonably convenient, safe, and suitable chutes, pens, and ways, and *be permitted egress for removal from said unloading pens of such live stock to the nearest public street,* via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges of the defendants for the transportation of such direct shipments from the origin thereof to the Union Stock Yards in Chicago".

DEMAND UPON THE RAILROADS PRIOR TO RESORT TO COMMISSION WAS PROPER.

The original demand was based upon the decision of the Commission in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. The later demand was based upon the decision of the Commission in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C.

553, and the decision of the Supreme Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

We mention this fact because of the comment of the Supreme Court in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, reading as follows (p. 198):

> "In 1933 petitioner, without resort to the Interstate Commerce Commission, demanded that the railroads alter this long-standing practice so as to relieve it from payment of this additional charge."

We respectfully suggest that the demand, prior to resort to litigation, was proper. It merely requested the railroad defendants to give effect to a ruling of general application made by the Commission. This is upon the theory that any decision made by the Commission is not merely for the private benefit of the parties but lays down a rule of which any member of the public may take advantage after such rule has been made. This is the doctrine of *A. J. Phillips Co.* v. *Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. ed. 774, where the court said (p. 665):

> "But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public with the result that the order of the Commission would have created a preference in favor of the parties to the record, and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order."

DISCUSSION OF THE DECISIONS UPON WHICH THE COMMISSION BASED ITS FINDING THAT THE SECRETARY OF AGRICULTURE HAS ASSERTED JURISDICTION OVER CHARGES FOR MERE EGRESS FROM RAILROAD CARS TO A PUBLIC STREET.

In paragraph 18 of the complaint in the District Court (R. p. 14) appellants alleged that the Commission erred in the following findings of fact and conclusions of law (R. pp. 53, 54):

> "In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at *many* public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra; Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary."

This is a startling error. It will be noted here that the Commission says that the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at *many* public yards and that such orders have been sustained in two cases in the United States Supreme Court and one in the Federal District Court, namely:

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 80 L. ed. 1033;

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470, 82 L. ed. 1469; and

Union Stock Yards Co. of Omaha v. *United States*, 9 F. Supp. 864.

These are the only three stock yards concerning which there was evidence in this record of fixation of rates of any character by the Secretary. Consequently the word *many* is without any support of record.

The court may read these three decisions with care, and the orders of the Secretary therein, and it will find that they contain not a word, phrase, or sentence referring to *mere egress* at the public stock yards there involved or to the jurisdiction of the Secretary over such service. These decisions show nothing to support the finding of the Commission. It will also be readily understood that such an issue could not have arisen in those cases.

The affirmative proof of this fact fortunately is in the record. The carrier defendants introduced as exhibit 41 the decision in Bureau of Animal Industry docket No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Company*, which is the decision and order of the Secretary reviewed in *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469. (This case is cited by the Commission as abolishing the rule of the *Covington* case, 139 U. S. 128, 35 L. ed. 73, but cited by the Supreme Court to the contrary effect in *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 219, 84 L ed. 198).

The carrier defendants offered in evidence as exhibit 42 the decision in Bureau of Animal Industry docket No. 344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.*, which was the decision and order of the Secretary sought to be annulled in *Union Stock Yards Co. of Omaha* v. *United States*, 9 F. Supp. 864.

They also offered in evidence as exhibit 43 the decision in Bureau of Animal Industry docket No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company*, which was the decision and order of the Secretary reviewed in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. ed. 1033.

It should be here remembered that in its complaint before the Commission (R. p. 33) appellants prayed for an order requiring the railroad defendants to permit appellants to "obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways and be permitted *egress* for removal *from said unloading pens* of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yards and Transit Company of Chicago". This is what the Commission refers to as mere egress.

In the last paragraph on page 180 of the Commission's decision (R. p. 36), the Commission describes the yardage service now rendered on these direct shipments. At pages 181 and 184 of the decision the Commission points out that appellants do not desire any of these stock yard services nor request nor desire that any of their direct shipments be held or placed in holding pens, *but only the right to remove the live stock immediately from such pens to the nearest public street free from payment of a yardage charge.* This demand is one that only could be made upon the rail carrier with whom the shipper has a contract for transportation and delivery of his live stock.

In the three cases before the Secretary of Agriculture above mentioned *no railroad* and *no shipper* was a party. Each case was one initiated by the Secretary on his own motion to determine reasonable rates for *stock yard* services. No one was before the Secretary in any of the three cases demanding that the railroads afford egress from the unloading pens without stock yard service. Such a complaint could not have been brought before the Secretary, because whatever duty there may be in that respect rests upon the carrier with whom the shipper has a contract of transportation and not upon a stock yard company

which undoubtedly has the right to charge for all stock yard services rendered by it under the *Packers and Stockyards Act, 1921.*

1. The decision of the Secretary which was the basis of the first case cited by the Commission (B. A. I. Dkt. No. 298, *Secretary of Agriculture v. St. Joseph Stock Yards Company,* exhibit 43 in this record) *makes no mention anywhere of direct shipments to packers.* Referring to the yardage charges there prescribed by the Secretary, the Secretary said (p. 8):

> "The above stated charges, usually designated 'yardage charges' are considered as covering the *warehousing* of the livestock throughout its stay in the stockyards regardless of the duration thereof or the number of changes of ownership which occur, the exception being that on livestock resold in the commission division one-half of the above rates additional is charged."

No distinction was made as to direct shipments to packers, to mere egress, or to anything else of that character. The Secretary prescribed a yardage charge applicable alike to all live stock received at the stock yards for the customary stock yard services of holding, feeding, watering, weighing, etc.

2. The decision of the Secretary which was reviewed in the second case cited by the Commission (B. A. I. Dkt. No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Company,* exhibit 41 in this record) again shows that the question of mere egress was not before the Secretary. That decision contains a mere mention of direct shipments. In paragraph 14, page 4, of the Secretary's decision we find the following statement:

> "14. Respondent provides the physical facilities on which the livestock market is conducted, and renders certain services in connection with livestock coming to the stockyard to be marketed, livestock shipped direct to packers, livestock stopped in transit and handled for the railroads, and livestock handled for traders.

Some of the facilities of respondent are used in connection with receiving, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock at its stockyard. For these services respondent charges certain rates."

In paragraph 20, page 5, of the decision there appears the following statement:

"20. For its services in *driving the livestock from the unloading chutes to pens, counting, checking, and keeping a record of each consignment, the furnishing of water, the weighing,* and the use of the physical facilities necessary in performing these services, respondent charges the owner or shipper of livestock brought to market the following rates known as yardage charges:"

It will be noted that no distinction was made as to whether live stock was consigned to a commission man for sale or consigned direct to a local packer. Obviously this is not the service sought by appellants.

By reference to page 79 of exhibit 41 (which contains the order of the Secretary), it will be noted that the Secretary prescribed the same yardage rates on live stock received and sold at the Denver yards, on live stock sold or contracted in the country to be weighed and delivered at the Denver yards, and on live stock consigned direct to packers and slaughterers. It is perfectly obvious from the decision that, in so far as direct shipments were considered (and they are only mentioned at the points indicated), the Secretary was dealing with the *complete yardage service.* This involved driving the live stock from the unloading chutes to pens, counting, checking, keeping a record of each consignment, furnishing water, weighing, and the use of the physical facilities necessary in performing such services.

The court will search the decision of the Secretary in vain for any discussion of or reference to the question of egress from railroad cars as compared with the full yard-

age service performed under the *Packers and Stockyards Act, 1921*, where the carrier furnishes holding pens, water, feed, and the service of weighing and finally delivering to the purchaser.

3. The decision of the Secretary which was reviewed in the third case cited by the Commission (B. A. I. Dkt. No. 344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.*, exhibit 42 in this record) likewise shows, for the reasons above discussed in connection with the *St. Joseph* and *Denver cases*, that no finding was made by the Secretary with respect to mere egress. The only reference there made to so-called direct shipments appears in paragraph 23, page 7, of the Secretary's decision and reads as follows:

> "23. In most instances *it is not practicable* or convenient *for purchasers* to receive their livestock direct from the vendors *or remove it from the yards immediately after being weighed.* When livestock has been weighed and title passed from the original shipper, the nature of its further handling by respondent depends upon the class of purchaser who has acquired it. If the purchaser be a local packer, the livestock is driven by respondent from the scale to *holding pens* customarily set aside for that purpose, where such livestock is held in the custody of the respondent until the packer takes delivery of it and removes it from the stockyards. Such facilities, known as packer holding pens, are similar in physical characteristics to the so-called commission division where livestock is yarded for the original shipper."

It will be noted that the Secretary there was describing shipments consigned to local packers who apparently desired the stock yards to *weigh the shipments, hold them in pens set aside for that purpose, and furnish the ordinary stock yard services.* No question as to the right to egress in connection with delivery by a common carrier by railroad appears in that decision. No such issue could have

been before the Secretary because there were no railroads respondents in the proceeding and no shipper was requesting any such order as that contained in appellants' complaint before the Commission.

It will be noted by reference to exhibit 42 that the order prescribed the same yardage charge without any distinction as between directs or other live stock; and that, except as mentioned in the foregoing quotation, direct shipments are not mentioned in the decision. Again it is very evident in this decision that the Secretary asserted no jurisdiction of yardage charges covering mere egress. The question was not before him.

We submit that such an obvious misstatement by the Commission is very prejudicial to appellants because, if the error therein contained is not examined carefully, it might be believed by the court that the Secretary has asserted jurisdiction covering "mere egress" at many public yards. The plain fact is that the Secretary has not done so in any cases, including those cited in the Commission's decision.

On the contrary, the Commission has held in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705, and *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, that stock yard charges, in so far as they are assessed for the use of stock yard facilities in effecting delivery of interstate shipments, *are charges for transportation within the meaning of that term as defined by section 1 of the Interstate Commerce Act*, and that the Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

To the same effect are:

Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73;

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 79 L. ed. 1382;

Union Stock Yard & T. Co. v. *United States*, 308 U. S. 213, 84 L. ed. 198;

United States v. *Interstate Commerce Commission*, 73 F. (2d) 948 (Court of Appeals for the District of Columbia); and

Armour & Co. v. *Alton R. Co.*, 111 F. (2d) 913 (Seventh Circuit).

At any rate this finding of the Commission would seem to have been definitely overruled by this court in the recent case of *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where the court said (pp. 200, 201):

> "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdition of the Interstate Commerce Commission."

THE COMMISSION'S REVIEW OF THE CASES HERETOFORE DECIDED BY IT, INVOLVING SUBSTANTIALLY THE SAME QUESTION OF DELIVERY AT PUBLIC STOCK YARDS, IS INACCURATE, INCOMPLETE, OMITS CERTAIN IMPORTANT DECISIONS, AND FAILS TO STATE FAIRLY THE CONCLUSIONS REACHED BY THE COMMISSION OR THE REASONS THEREFOR.

In paragraph 16 of the complaint in the District Court appellants alleged as error the findings of the Commission with respect to decisions heretofore made by it which, according to the Commission, involved the same question that is presented in this case. The Commission has omitted four important cases (*Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. Rep. 601; *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641; *E. Kahn's Sons Co.* v. *Baltimore*

& O. R. Co., 192 I. C. C. 705; and *Adolf Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606). The summary of the decisions mentioned by the Commission is inaccurate, incomplete, and does not state the conclusions reached by the Commission in the prior decisions or the reasons therefor.

1. The Commission states (decision, pp. 194-195, R. p. 52):

> "The first case, after the enactment of section 15 (5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a *public stockyard* for dealers whose places of business were outside the yards were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens."

The Commission fails to point out that the service involved in *Southwestern Horse & Mule Asso.* v. *A. T. & S. F. Ry. Co.*, 129 I. C. C. 730, and that demanded in this case is essentially different. In the former the service performed was a *stock yard service* for which *yardage* charges are collected. The service with which the Commission was there dealing is described at pages 733-734 of the decision as follows:

> "The stockyards company immediately notifies the outside dealers of the arrival of the shipments, ascertains and records the location of the cars, and unloads the animals into pens adjoining or in the vicinity of the unloading platform, hereinafter called unloading pens, and *cares for them as long as they remain in the stockyards. This includes watering facilities always available, sometimes their removal to other open pens, or to covered pens, especially when received during the night or unfavorable weather, and in general the shelter and protection of the animals; also the privilege of sale upon the market while on the premises of the stockyards company.*"

In other words, the dealers were receiving a *complete stock yard service*, coming within the terms of the *Packers and Stockyards Act, 1921.* While some of the dicta in that decision may have been wrong, the decision was right on the facts. Where the consignee desires a stock yard service (not mere access to the railroad unloading pens for removal of the stock) he is obliged to pay for it, and that is all that was decided in the *Southwestern Horse & Mule Association case.*

2. The Commission dealt with this question during the first year of its existence in *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. Rep. 601. In that decision the Commission said (p. 603):

> "As common carriers of live stock it is the legal duty of the defendants to provide reasonable and proper facilities for receiving on board, and for discharging from their cars, all live stock offered for shipment or brought over their respective roads and their connections to or from the City of Covington, Kentucky, free of charges other than the usual transportation charges. It is not believed that this legal duty and obligation of defendants is fully discharged by receiving on, and discharging from, their cars live stock at a depot, *access to which must be purchased.*"

This decision is omitted from the Commission's summary of decided cases upon this issue.

3. The next case dealing with this question, at a public stock yard after the passage of section 15(5), is entirely omitted in the Commission's summary of decided cases. The Commission's ruling as to the law in that case is in direct conflict with its ruling in the present case. We refer to the decision in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. The Commission reexamined the law as declared by it in the *Southwestern Horse & Mule Association case* and stated exactly the construction for which appellants contend. In fact counsel for appellants

could not so well state their own contention as did the Commission in this decision (p. 644):

> 'The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession. *North Penn. Railroad* v. *Commercial B'k*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation.
>
> "With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, *and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported.*"

The Commission continued its discussion as to whether section 15 (5) superseded the other provisions of law and of the *Interstate Commerce Act* (161 I. C. C. 646):

> "The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. *The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.*"

The Commission next proceeded to examine the question whether the enactment of section 15 (5) limited the jurisdiction of the Commission to the point of unloading of live stock into suitable pens at a public stock yards, or whether the jurisdiction extended to the entire service of delivery to the consignee. Upon this point, the Commission said (pp. 646-647):

"The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. *A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments.* If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. *The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction.* 36 *Ruling Case Law*, page 918.

"The primary purpose of the packers and stockyards act, 1921, is to regulate the operations of packers, commission merchants, and stockyard owners in connection with the handling of livestock *consigned for sale* at primary markets. *Stafford* v. *Wallace*, 258 U. S. 495, 514. That act expressly states that its provisions shall not affect the power or jurisdiction of this commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within our power or jurisdiction. In considering the question of our jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, we stated in *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, at page 618:

> Bearing in mind that the two acts should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal

agencies entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision to be resolved in favor of the authority delegated in the older of the two statutes, *we can see nothing in the provisions of the packers and stockyards act, 1921, which in any way limits or affects the jurisdiction of this commission previously conferred to regulate 'all charges * * * for any service rendered or to be rendered in the transportation of passengers or property.'*

"We find that the charges herein assailed *in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments* were *charges for transportation* within the meaning of that term as defined in section 1 of the interstate commerce act, and *that we have jurisdiction to pass upon the legality and reasonableness of such charges.*"

In this case the Commission definitely held that *yardage charges* at a public stock yards, assessed for mere delivery, were *transportation charges.* The Commission held that it had jurisdiction over the transportation, not only up to the unloading into suitable pens, but also to the extent of requiring the carrier to furnish "a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property". All that appellants seek here is to have the relief granted by the Commission to the complainant in the *Allied Packers case.*

4. The next case omitted from the Commission's summary of its own decisions involving this same issue at a public stock yards, is *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705. In that decision the Commission said (p. 709):

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, *and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease.*"

This was an unqualified statement by the Commission of the right of the shipper and a complete reaffirmation of the Commission's decision in the *Allied Packers case, supra.* Under that statement of the law appellants are entitled to the relief sought before the Commission in this case.

It may be noted that in the *Kahn* decision the Commission made exactly the distinction for which appellants contend. In that decision the Commission pointed out (p. 706):

> "No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, *but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied.*"

This is in accordance with the contention of appellants. According to the Commission, it was only in cases where yardage service was desired and requested that it did not have jurisdiction of the delivery charges and that is obviously true for such service after transportation and delivery comes within the *Packers and Stockyards Act, 1921.*

This construction by the Commission was sustained by the United States Circuit Court of Appeals for the District of Columbia in *United States* v. *Interstate Commerce Commission,* 73 F. (2d) 948. That was a proceeding for a writ of mandamus brought by the Kroger Grocery & Baking Company seeking in substance to require the Commission to reverse its decision in the *Kahn case.* The court refused to issue the writ of mandamus because, in its opinion, it was not necessary for the consignee at Cincinnati to pay any charge in excess of the line haul rate in order to obtain delivery of its live stock. The following quotation from said decision clearly establishes the correctness of our interpretation of the decision in the *Kahn case* (pp. 951-952):

> "Undoubtedly, as was said in *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73,

a carrier of live stock has no more right to make a special charge for delivering the stock in and through stock yards provided by itself, *or provided by another corporation*, than a passenger carrier has to make a special charge against a passenger for the use of its passenger depot. The duty of the carrier begins with the delivery of the stock to the carrier to be loaded on its cars, and ends only after the stock is unloaded and delivered or offered to be delivered to the consignee, and the precise terms of the statute (section 15 (5)) impose upon it the obligation to place the stock in suitable pens without extra charge to the consignee. These duties, we think, involve also the duty to furnish all necessary service incident to the carriage, including the ascertainment in some way of the accurate weight of the shipment, since the basis of the transportation charge is the weight of the cattle. * * * *The other services which it renders, that is to say, hoof-weighing and retention when desired, are stock yards services with which the carriers are not concerned.* Based on this conclusion, the Commission reports that the method last above mentioned (f) was available to the consignee, and that under its provisions freight charges could be accurately determined and the cattle delivered to the consignee from the unloading pens *without extra charge or cost to it.* This interpretation finds support in the fact that in the case of other consignees of live stock at Cincinnati, whose relation to the subject-matter was in all respects identical with that of petitioner, delivery of live stock was accomplished precisely in the above-stated manner."

5. The Commission also omitted any reference to its decision in *Adolf Gobel, Inc. v. Baltimore & O. R. Co.*, 200 I. C. C. 606. In that case no charge was made if a mere egress from the public yards was all that was sought by the consignee, but a charge was made if the consignee desired and received a yardage service. Upon this factual situation the Commission dismissed the complaint, and its decision was correct.

6. The Commission next (p. 195 of decision, R. p. 53) places its construction upon the decision of the Supreme Court in the *Hygrade case (Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382). The Commission says that "the court and we have interpreted that decision as holding that transportation of direct shipments of live stock to a public stockyard terminates at the unloading pens" and cites *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469, in support of the doctrine adopted by "the court and we".

It should be noted that in the later case of *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 84 L. ed. 198, at page 219, the court cites the *Denver Union Stock Yard Company case* directly to the contrary and in support of the doctrine of the *Covington Stock Yards case*, 139 U. S. 128, 35 L. ed. 73 (which the Commission here overrules).

In the *Union Stock Yard & T. Co. case, supra*, at page 219, the court said:

> "Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461 * * * *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469."

That this principle of law applies to the transportation of live stock not only at common law, but under the *Interstate Commerce Act*, was recently held by the Circuit Court of Appeals for the seventh circuit in *Armour & Co.* v. *Alton R. Co.*, 111 F. (2d) 913, 916, decided April 4, 1940. In that decision the Circuit Court of Appeals for this circuit (Judges Sparks, Treanor, and Kerner) said:

> "In passing we add that the transportation of livestock by rail begins with its delivery to the carrier for loading at point of origin, and ends after unloading

for delivery or tender to the consignee at the place of destination. This was the rule at the common law. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, 11 S. Ct. 461, 35 L. Ed. 73. *It is the rule under the Interstate Commerce Act.* See *Union Stock Yard & Transit Co.* v. *United States, supra.* No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, 'a mere way out to the public highways', is incidental to and part of the delivery. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193, 201, 55 S. Ct. 748, 79 L. Ed. 1382; See also dissent therein, 295 U. S., at page 203, 55 S. Ct., at page 753, 79 L. Ed. 1382."

An examination of all the cases dealing with this issue decided by the Commission shows that, with the exception of the present case, the Commission has uniformly held that where a *stock yard service* at a public stock yards is requested by and is performed for the consignee, the shipper must pay, in addition to the railroad rate, the charge for stock yard services contained in tariffs filed with the Secretary of Agriculture; but that where, as here, nothing is sought except mere *access* to the carrier's unloading chutes for *immediate* removal of the live stock from the railroad cars, no charge may be made in addition to the line haul rate to the unloading chutes.

It will also be noted that the decision of the Commission in the present case is in direct conflict with the recent decisions of this court and the recent decision of the Circuit Court of Appeals for this circuit.

THE COMMISSION ERRED IN FAILING TO FIND (IN ACCORDANCE WITH THE UNDISPUTED EVIDENCE) THAT EGRESS WITHOUT A YARDAGE CHARGE IS AFFORDED BY THE RAILROAD DEFENDANTS AT MANY IMPORTANT PUBLIC STOCK YARDS.

It was alleged in paragraph 20 of the complaint in the District Court (R. p. 14) that the Commission erred in failing to include in its report any reference to and in

failing to give any weight to evidence offered by appellants, which shows that delivery of direct shipments of live stock to the consignee, without charge in excess of the published tariff rate, where yardage service is not required or requested by the consignee, is provided at many important stock yards which are served by the railroad defendants; and in failing to find that in one instance of this kind the practice was prescribed by the Commission and in another instance is in accordance with a finding of the Commission.

The fact that egress without charge for direct shipments of live stock is permitted at many important stock yards in the United States, and has been required by the Commission, is not mentioned in the decision of the Commission, although it was the subject of substantial testimony on the part of appellants. In this connection, we call attention to pages 105-136 of the transcript (R. pp. 189-207, exhibits 5-18, inclusive). This evidence shows briefly the following situation as to various public stock yards.

Union Stock Yards Company of Baltimore, Md. Egress for direct shipments is allowed without charge. Both the Baltimore & Ohio Railroad and the Pennsylvania Railroad (defendants before the Commission) reach this stock yards. (Exhibit 5, R. pp. 194, 195.)

The Buffalo Stock Yards of East Buffalo, N. Y. Egress from the unloading pens is permitted without charge at this stock yards. Such egress is in conformity with the decision and order of the Commission in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Exhibit 6, R. pp. 197, 198.)

Union Stock Yard Company of New Jersey, Benning, D. C. Egress of live stock from unloading pens is permitted without charge in addition to the transportation rate. (Exhibit 7, R. p. 198.) *Adolph Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606, concerned ship-

ments delivered to the stock yards at Benning. The Commission there pointed out that the shipper could obtain delivery of live stock at the line haul rate and without yardage charges if it desired delivery at the unloading pens, but that the stock yard company had performed services for the shipper in addition to mere egress which consisted of holding, feeding, watering, etc.

The Cincinnati Union Stock Yard Company, Cincinnati, Ohio. Egress of direct shipments where no stock yard service is desired is here allowed without charge above the transportation rate. (Exhibit 8, R. p. 199.) This was so found by the Commission in *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705. The Commission there stated (p. 706):

> "*No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed*, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied."

It was because this egress was allowed that the complaint was dismissed. See also *United States v. Interstate Commerce Commission*, 73 F. (2d) 948. Upon the question whether the consignee was entitled to egress, the Commission said in the *Kahn* case (p. 709), contrary to its holding in the present case:

> "*The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease.*"

This ruling of the Commission was sustained by the United States Circuit Court of Appeals in the case last cited.

The defendants before the Commission who deliver liv

stock at the Cincinnati Union Stock Yards are The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Pennsylvania Railroad Company, and the Chicago, Indianapolis and Louisville Railway Company.

The Cleveland Union Stock Yards Company, Cleveland, Ohio. Egress for direct shipments is permitted here without assessment of charges above the line haul rate. Swift and Company receives such shipments from railroad defendants at its Cleveland packing plant. (Exhibit 9, R. pp. 199, 200.) The railroad defendants before the Commission who make deliveries at Cleveland Union Stock Yards are the Pennsylvania Railroad, Baltimore & Ohio Railroad, and certain others.

Detroit Stock Yards, Detroit, Mich. No charge other than the line haul rate is made in connection with egress of direct shipments of live stock at the Detroit Stock Yards. Live stock is delivered at this public stock yards by the New York Central Railroad, a defendant in the complaint before the Commission. (Exhibit 10, R. p. 200.)

The Belt Railroad and Stock Yards Company of Indianapolis, Ind. Direct shipments of live stock are delivered through this stock yards at Indianapolis with no charge over and above the line haul rate, provided the live stock is removed from the carrier's cars or unloading pens immediately upon their arrival. Certain of the railroad defendants before the Commission, including the Baltimore & Ohio Railroad, Chicago Indianapolis and Louisville Railway, and the Pennsylvania Railroad, deliver shipments to the Indianapolis Stock Yards under this arrangement. (Exhibit 11, R. p. 201.)

Los Angeles Union Stock Yards Company, Los Angeles, Calif. At this stock yards, if possession of the live stock is taken promptly at the unloading chutes, there is no charge in addition to the line haul rate. The Atchison, Topeka and Santa Fé Railway, a railroad defendant before

the Commission in this case, makes its delivery through said stock yards at Los Angeles. (Exhibit 12, R. p. 202.)

The Bourbon Stock Yard Company, Inc., Louisville, Ky. This is the public stock yard through which the line haul carriers, including certain railroad defendants before the Commission such as the Chicago, Indianapolis and Louisville Railway, Cleveland, Cincinnati, Chicago and St. Louis Railway, and the Pennsylvania Railroad, generally make their deliveries at Louisville, Ky. No charge is made if delivery of live stock is made immediately to consignees at the unloading chutes or pens. (Exhibit 13, R. pp. 204, 205.)

Muncie National Stock Yard Company, Inc., Muncie, Ind. Here again no charge, in addition to the line haul rate, is incurred where immediate delivery is made to consignee at the unloading chutes. Certain of the railroad defendants before the Commission, including the Chesapeake and Ohio Railway, Cleveland, Cincinnati, Chicago and St. Louis Railway, and Pennsylvania Railroad, deliver their shipments of live stock at this public stock yards under this arrangement. (Exhibit 14, R. p. 205.)

West Philadelphia Stock Yards Company, Philadelphia, Pa. No charge, in addition to the line haul rate, is made for direct shipments delivered at this stock yards when consignee takes immediate possession of the live stock upon arrival at the unloading chute. Certain of the railroad defendants before the Commission, including the Baltimore & Ohio Railroad and Pennsylvania Railroad, make deliveries to the unloading pens at these yards without extra charge. (Exhibit 15, R. pp. 205, 206.)

Pittsburgh Joint Stock Yards Company, Pittsburgh, Pa. Only the line haul transportation charge is assessed on live stock delivered at this stock yards in Pittsburgh when

the consignee takes immediate possession of the live stock upon arrival at the unloading chutes. Delivery is made at this stock yards by certain of the railroad defendants before the Commission, including the Pennsylvania Railroad and the Baltimore & Ohio Railroad. (Exhibit 16, R. pp. 206, 207.)

The Wichita Union Stock Yards Company, Wichita, Kans. No charge above the line haul transportation rate is made for delivery of live stock through this stock yard if the consignee is prepared to take immediate possession at the unloading pens. The Atchison, Topeka and Santa Fe Railway and the Chicago, Rock Island and Pacific Railway, railroad defendants in the case before the Commission, deliver live stock to this stock yards. (Exhibit 17, R. p. 207.)

Since the decision of the Commission in the present proceeding (April 8, 1940) a later decision of the Commission shows that there are several eastern stock yards at which egress is allowed without charge above the published tariff rate and is in fact paid for by the line haul railroads. We refer to the decision of the Commission in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941). The Commission there states that the Jersey City Stock Yards operates a *public* stockyards in Jersey City, N. J., and then points out, at page 259:

> "The stockyard company also notifies consignees of arrival of shipments, preserves the identity of each consignment, *delivers stock to consignee* or on floating equipment, obtains receipts therefor, collects transportation charges, handles loss and damage claims, assumes all responsibility therefor, weighs stock if requested, and performs all clerical work in connection with such services. It also orders cars, checks weights, routes shipments, and prepares freight bills on prepaid shipments. For these services the railroads pay the stockyard company $2.75 per car, except on outbound shipments. This charge is published in tariffs on file with us."

This practice was not disapproved by the Commission in said decision.

Concerning the West Philadelphia Stock Yard Company which operates the only public stock yard in Philadelphia, Pa., the Commission said in the same decision, at page 250:

> "The stockyard company also notifies the railroads of the arrival of the stock, weighs it, collects transportation charges, and *delivers* the stock to consignees at various points in the building. The stockyard company receives an additional $1.00 per car from the railroads for performing these services."

This practice was not disapproved by the Commission.

The Commission points out, at page 268 of said decision, that the Union Stock Yard & Market Company, Inc., is the only public stock yards in New York, N. Y. The decision of the Commission further states that this stock yard company:

> "agrees, among other things, to provide suitable, adequate, and proper accommodations for the unloading, weighing, care, handling, and *delivering of livestock to consignees*, to collect transportation charges and remit them to the New York Central, and to perform all necessary services in connection with accounting and handling of claims, at compensation to be based upon the reasonable cost thereof plus a reasonable percentage for supervision and profit. The present charge of the New York Stock Yards Company for performing these services is $8.47 per car. This charge is published as an allowance in tariffs of the New York Central on file with us."

This practice was not disapproved by the Commission.

The importance of this evidence goes to the following points:

1. There is no universal rule in this respect.

2. There has been no interpretation of section 15(5) by the packers as shown by "their affirmative action."

3. It tends to show error in the finding of the Com-

mission (decision p. 188, R. p. 45) where the Commission says that the carrier defendants "have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens."

As to point 1, it will not only be noted that the evidence shows that the practices of the railroads are not uniform, but that their practice at the Cincinnati Stock Yards is in accordance with the findings of the Commission in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, and that egress without extra charge was specifically required at the Buffalo Stock Yards by the order of the Commission in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641.

RAILROAD RATES TO YARDS WHERE EGRESS IS ALLOWED SAME AS TO CHICAGO, WHERE IT IS DENIED.

The question whether the rates cover the service is believed by appellants to be immaterial because, if the rates do not cover the service, they can be increased sufficiently to do so or a specific added charge made for egress on directs. It will be noted, however, that certain of these stock public yards at which the railroad defendants in this case deliver live stock, and have arranged for egress without charge, are in the immediate freight territory in which Chicago is located, that known as central territory, including the states of Illinois, Indiana, and Ohio, border points such as Louisville, and western parts of New York and Pennsylvania. Within this territory are the following stock yards where egress is permitted without charge:

Buffalo Stock Yards, East Buffalo, N. Y.
Cincinnati Union Stock Yards, Cincinnati, Ohio.
Cleveland Union Stock Yards, Cleveland, Ohio.
Detroit Stock Yards, Detroit, Mich.
Indianapolis Stock Yards, Indianapolis, Ind.
Bourbon Stock Yards, Louisville, Ky.
Muncie National Stock Yards, Muncie, Ind.
Pittsburgh Joint Stock Yards, Pittsburgh, Pa.

In *Eastern Livestock Cases of 1926*, 165 I. C. C. 277, at page 313, the Commission prescribed a mileage scale of live stock rates within central territory. These rates are the same within central territory regardless of the destination. That is to say, the rates are, mile for mile, the same to Chicago from any origin in central territory as they are to Buffalo, Cincinnati, Cleveland, Detroit, Indianapolis, Louisville, Muncie, and Pittsburgh. The rates so prescribed by the Commission are still in effect except for a flat percentage increase in all freight rates allowed by the Commission in *Fifteen Percent Case*, 1937-1938, 226 I. C. C. 41. If exactly the same freight rates for any given number of miles to Buffalo, Cincinnati, Cleveland, Detroit, Indianapolis, Louisville, Muncie, and Pittsburgh are sufficient to permit egress without extra charge above the line haul rate, it is difficult to understand why they should be inadequate for that purpose when applied to Chicago.

The decision of the Commission in *Eastern Live Stock cases, supra*, fixing the live stock rates to Chicago and the other points mentioned, makes no finding as to whether the rates do or do not include egress at the stock yards.

EXHIBIT 47 IN RECORD BEFORE COMMISSION.

An Agreement, made and entered into at the City of Jersey City, State of New Jersey, this 15th day of January, A. D. one thousand eight hundred and ninety-two, by and between THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY (hereinafter called the "New Jersey Company") as party of the first part, and PHILIP D. ARMOUR, JONATHAN O. ARMOUR, PHILIP D. ARMOUR, JUNR., and GEORGE H. WEBSTER, individually and as co-partners, composing the firm of Armour & Company; NELSON MORRIS, FRANK E. VOGEL and EDWARD MORRIS, individually and as co-partners, composing the firm of Nelson Morris & Company, and GUSTAVUS F. SWIFT, EDWIN C. SWIFT, LOUIS F. SWIFT and EDWARD F. SWIFT, all of the City of Chicago, State of Illinois, parties of the second part.

WHEREAS the party of the first part, The Chicago Junction Railways and Union Stock Yards Company, is a Corporation organized and existing under the laws of the State of New Jersey, United States of America, with an authorized capital stock of thirteen million dollars ($13,000,000) divided into sixty-five thousand shares of six per cent. preferred stock of the par value of one hundred dollars ($100) each, namely $6,500,000, and sixty-five thousand shares of common or general stock of the par value of one hundred dollars ($100) each, namely $6,500,000, and of which said capital stock shares amounting in the aggregate to over the sum of $12,400,000 have been duly issued and are now outstanding; and which said Company was formed and incorporated for the purpose, among other things, of purchasing and holding shares of the capital stock of the Union Stock Yard and Transit

Company (hereinafter called the "Transit Company"); and

WHEREAS the said Transit Company was incorporated in the year 1865 under the laws of the State of Illinois, with power to locate, construct and maintain, at or in proximity to the City of Chicago, yards, inclosures, buildings, railway lines &c., for the conduct or accommodation of the business of a General Union Stock Yard for cattle and live stock; and

WHEREAS the said Transit Company in or about the year 1865 constructed and has since maintained in said City of Chicago large yards and extensive buildings, plant and railways necessary for the conduct of said stock yards business, which premises are owned by said Company, and represent the investment of its capital stock of $13,200,000 divided into 132,000 shares of the par value of $100 each; and

WHEREAS the said New Jersey Company purchased and acquired about 129,770 shares of said capital stock of said Transit Company, for which shares the said New Jersey Company paid the sum of over $22,000,000, partly in cash and partly in its bonds, which said bonds are part of a total issue of ten million dollars ($10,000,000), due July 1st, 1915, with interest at the rate of 5 per cent. per annum, payable semi-annually, and are secured by a deed of trust pledging as collateral security for their payment 120,000 of the shares of said Transit Company; and

WHEREAS the principal revenue and income of said Transit Company are derived from yardage charges on cattle and live stock, and from the sale of feed for such cattle and live stock, and which revenue and income from such yardage and charges have annually increased since the establishment of the stock yards of said Transit Company, and now amount to about the sum of $2,000,000 per annum; and

WHEREAS the market and demand for cattle and live stock at the yards of the Transit Company in the City of Chicago arise from and by reason of the presence of many large slaughtering, packing and canning plants and establishments on premises in the immediate neighborhood or contiguous to said stock yards, in the part of said city known as Packingtown, and the largest and the principal of such slaughtering, packing and canning plants and establishments are owned or controlled by the parties of the second part hereto, whose purchases of cattle and live stock at said yards have for several years last past represented and constituted about fifty-five (55) per cent. of the demand and market for cattle at the said yards; and

WHEREAS said co-partnership of Nelson Morris & Company are the owners and holders of all of the shares of the capital stock of the Fairbank Canning Company and said Gustavus F. Swift, Edwin C. Swift, Louis F. Swift and Edward F. Swift are the owners and holders of a majority of the shares of the capital stock of Swift and Company, both of said corporations being organized under the laws of the State of Illinois; and

WHEREAS the said parties of the second part have purchased and acquired certain premises at Packingtown aforesaid, known as the "Central Stock Yards," near the yards of the said Transit Company, and have constructed and erected on said premises various platforms, pens, sheds, railway sidings, &c., for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago, or directly consigned to them or either of them, and thereby avoiding the payment of any yardage charges to the said Transit Company, and have demanded that the said Transit Company permit the use of their railway tracks for the transportation and delivery of such cattle and live stock to their said Central Stock Yards, and said Armour & Company, Swift and Company, and

Nelson Morris & Company have recently commenced three several suits in equity in the Circuit Court of Cook County, State of Illinois, against the said Transit Company, claiming and demanding as relief that the said Court by order and decree compel the said Transit Company to afford facilities over its railways for the transportation and delivery of any and all cattle and live stock belonging or consigned to them or any of them or to said Central Stock Yards without the payment of the usual yardage charges thereon as heretofore paid by them and collected by said Transit Company; and

WHEREAS if such parties succeed in such litigation and discontinue purchasing live stock at such yards of the Transit Company to the extent of the capacity of said Central Stock Yards, the demand and market in Chicago for live stock would be diminished to the extent of over 500,000 cattle per annum, thus increasing *pro tanto* the demand and market in other States, viz., at Kansas City, at Omaha and elsewhere, to the great injury and diminution of the market at Chicago, and to the loss and damage of said Transit Company's income and yardage to the extent of over $100,000 per annum; and

WHEREAS the said New Jersey Company desires to secure and provide, for the use of the said Transit Company, premises located near the City of Chicago and suitable for the business of stock yards in case it shall hereafter become necessary to remove thereto the said yards of the Transit Company by reason or because of the growth of the City of Chicago or municipal ordinances or legislation or other causes; and

WHEREAS the said parties of the second part have caused to be purchased and now own at Tolleston, in the State of Indiana, and within about ten miles of the City of Chicago, a tract of land consisting of about four thousand acres which is believed to be the most suitable location within such distance for the purpose mentioned, and which they

have acquired for the purposes and with the intention of removing their entire slaughtering, packing and canning plants and establishments from said Packingtown, in the City of Chicago, to the said premises at Tolleston, State of Indiana, and of inducing other slaughtering, packing and canning concerns to likewise remove their plants and establishments to said Tolleston property, and with the intention of locating and establishing in the State of Indiana, stock yards for the use of all parties locating on or in proximity to said premises, and have entered into negotiations and contracts with one or more railway companies to furnish the required facilities for the transportation to and from said property of cattle, live stock, &c.; and

WHEREAS the removal from the City of Chicago to Tolleston aforesaid of the businesses and slaughtering, packing and canning plants and establishments so owned or controlled by said parties of the second part and said Swift and Company and the Fairbank Canning Company would diminish the demand and market for cattle and live stock at Chicago, and shipments thereof to the yards of said Transit Company, so as to result in a large decrease of its business, revenue and income, and so as to remove from said City of Chicago, State of Illinois, into another State, about one-half of the present demand and market at Chicago for live stock, to the great injury generally of the City of Chicago, and particularly of the business of said Transit Company; and

WHEREAS the said parties of the second part have consented to compromise their claims and demands against the said Transit Company as set forth and alleged in said three suits; also to transfer, surrender and convey to said Transit Company the said Central Stock Yards together with the railway sidings, platforms, pens, sheds, fixtures and appliances thereon, and to release and convey thereto all covenants or easements claimed and alleged in the said

suits; also to continue for the period of fifteen years from the first day of July, 1891, to conduct their several businesses at Chicago as aforesaid, and to purchase cattle and live stock at said yards of the Transit Company, and pay yardage charges upon cattle and live stock purchased and owned by or consigned to them; also to transfer and convey to said New Jersey Company one thousand acres of said tract of land at Tolleston, in the State of Indiana, and also to further covenant and agree as hereinafter particularly set forth, upon the terms and for the considerations below stated:

NOW THIS AGREEMENT WITNESSETH that the parties hereto for and in consideration of the premises and of the covenants and agreements hereinafter set forth, have covenanted and agreed and do hereby covenant and agree to and with each other as follows:

FIRST.—The said parties of the second part covenant and agree, upon demand of the said New Jersey Company, to cause to be conveyed to said Transit Company, all and singular the premises known as the Central Stock Yards, including any and all railway, sidings, platforms, pens, sheds, fixtures and appliances whatsoever, together with all covenants, rights, privileges and easements thereunto in any way appertaining, and including the covenants, rights, privileges and easements mentioned, referred to or set forth in the bills of complaint in said suits so pending in the Circuit Court of Cook County, Illinois. Such conveyance of said premises to said Transit Company shall be for the sum or consideration of one dollar, lawful money of the United States of America, payable by said Transit Company, and shall be in fee simple free and clear of all liens and incumbrances whatsoever.

SECOND.—The said parties of the second part covenant and agree that they will cause each and all of the said suits to be discontinued and abandoned at their own proper cost and expense, and that they will not, nor will any of

them, at any time during the continuance of this agreement, make or set up against the said Transit Company the claims and demands alleged in the bills of complaint in said suits, nor directly or indirectly bring or cause to be brought any similar suits at law or in equity making or alleging any claims or demands similar to those set forth in said bills of complaint.

THIRD.—The said parties of the second part further covenant and agree to convey or cause to be conveyed unto the said New Jersey Company, its nominees or assigns, one thousand acres of said land at Tolleston in fee simple free from all liens or incumbrances whatsoever, such land being more particularly described as follows:

"A tract of land containing one thousand (1,000) acres more or less, situated in the County of Lake and State of Indiana, being a part of sections two (2) and three (3) in township thirty-six (36) north, range eight (8) west and a part of sections thirty-four (34) and thirty-five (35) in township thirty-seven (37) north, range eight (8) west, described as follows, to wit: Beginning at a point on the south line of said section three (3) nine hundred seventy-eight and five-tenths (978.5) feet east of the southwest corner of said section three (3), and running thence east along the south line of said section, a distance of forty-two hundred eighty-three and one-tenth (4283.1) feet to the southeast corner of said section; thence north along the east line of said section three (3), seventeen hundred and eighty-eight (1788.0) feet; thence east 0° 56′ south (true bearing as governed by true meridian monumented at southwest corner of section four (4), township thirty-six (36) north, range (8) west seven hundred fifty-six and eight-tenths (756.8) feet; thence north 0° 56′ east (true bearing as governed by said true meridian) seventy hundred twenty-three and four-tenths (7023.4) feet to the shore of Lake Michigan; thence westwardly along said shore to a point north 0° 56′ east (true bearing as governed by said true meridian) from point of beginning; thence south 0° 56′ west (true bearing as governed by said true meridian) a distance of forty-one hundred twenty-six and

four-tenths (4126.4) feet to the north line of said section three (3), thence westwardly along said north line eleven hundred and fifty-five (1155.0) feet to the northwest corner of said section three (3); thence southwardly along the west line of said section three (3), twelve hundred forty-eight and one-tenth (1248.1) feet to a stone monument marking the southeast corner of Lake Shore and Michigan Southern Railroad Company's land; thence eastwardly parallel to the north line of said section three (3), eleven hundred and ten (1110.0) feet to a point north 0° 56′ east (true bearing as governed by said true meridian) from point of beginning; thence south 0° 56′ west (true bearing as governed by said true meridian) thirty-six hundred fifty-one and two-tenths (3651.2) feet to point of beginning, excepting the right of way across said premisses of the Lake Shore & Michigan Southern Railway Company and of the Baltimore & Ohio Railroad Company."

Fourth.—The parties of the second part further covenant and agree, that during the period of fifteen years from the first day of July, 1891, unless the Transit Company's yards are during that time removed from the City of Chicago, and in such event, then until such removal within said period, they and said Swift and Company and the Fairbank Canning Company shall and will continue their several businesses and slaughtering, packing or canning plants and establishments at Packingtown aforesaid and covenant, undertake and guarantee that any and all cattle and live stock slaughtered by them or any of them, or said companies or either of them, on their said premises or within two hundred miles of the City of Chicago, during such period, shall pass through and use said yards, and pay the usual yardage and charges therefor.

Fifth.—The said parties of the second part further covenant, undertake and guarantee that the said Transit Company shall receive and collect from its yardage and charges on cattle and live stock, owned or purchased by or consigned to said parties of the second part and said

companies, at said yards, the aggregate sum of at least two million dollars ($2,000,000) within six years from said 1st of July, 1891. If, at the expiration of said six years, the said yardage and charges on such cattle and live stock shall not have equalled the said sum of $2,000,000, then the said parties of the second part covenant and agree that they will immediately and on demand pay to the said New Jersey Company whatever sum may be necessary to make up the said $2,000,000.

SIXTH.—The said parties of the second part further covenant and agree that during the term of fifteen years from the said 1st of July, 1891, they will not themselves use, or permit others to use, any portion of said remaining three thousand acres at Tolleston for slaughtering, canning or packing-house purposes, and that during said term no portion of said three thousand acres shall be sold or conveyed without there being inserted in the deeds or grants thereof a condition or restriction against the use of the premises for any such purposes during said term unless the said New Jersey Company shall in writing expressly waive such condition in each and every instance. The said parties of the second part shall give, grant and convey to said New Jersey Company its nominees, or assigns, any and all reasonable easements and connections over said remaining three thousand acres, in order to enable the said one thousand acres or any part thereof to be connected by road or railway with Lake Michigan or any railways, canals, roads or highways in the neighborhood of said one thousand acres, and the said New Jersey Company, its nominees or assigns, as owners of the said one thousand acres, shall likewise grant to the parties of the second part, their nominees or assigns, such easements and connections over the said one thousand acres as may be reasonably necessary to connect any part of the said three thousand acres with said one thousand acres or with Lake Michigan, or any railways, canals, roads or highways in the neighborhood.

SEVENTH.—The said parties of the second part further covenant and agree that during the term of fifteen years from the said 1st of July, 1891, they, and said Swift and Company and said Fairbank Canning Company will aid, assist and co-operate with said Transit Company and said New Jersey Company in all lawful ways in furthering and promoting the business and interests of said Transit Company, and likewise covenant and agree that during said period they and said Swift and Company and said Fairbank Canning Company, will not, nor will any of them in said City of Chicago, or at any place within two hundred miles thereof, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards for the receipt and use of their own live stock.

EIGHTH.—The said parties of the second part further covenant and agree that as long as the said Transit Company shall conduct the business of a general stock yard for cattle and live stock at the City of Chicago, State of Illinois, on its premises aforesaid, or any part thereof, they and said Swift and Company and said Fairbank Canning Company will not, nor will any of them, within the limits of the City of Chicago, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock.

NINTH.—The said parties of the second part further covenant and agree that they will do or cause to be done, execute or cause to be executed, any and all such further acts, deeds and instruments as may be necessary for the more effectually carrying out this agreement according to its true intent and purpose and that may be reasonably advised or required by said New Jersey Company or its counsel. The covenants herein recited on the part of the parties of the second part are joint and several, and said parties and each of them, jointly and severally, guarantee

the due performance of all the obligations and conditions hereof by the other parties of the second part, and shall be jointly and severally responsible in damages to the said Transit Company or said New Jersey Company, their successors or assigns, for any and all breach or breaches thereof, by one or more of said parties of the second part.

TENTH.—The party of the first part hereto, said New Jersey Company, covenants and agrees to execute, issue and deliver to said parties of the second part three million dollars ($3,000,000) of income bonds, dated July 1st, 1891, and payable as to principal on or before the 1st day of July, 1907, with interest payable semi-annually on the first days of January and July of each year at such rate not exceeding five per cent. per annum as the net surplus income of said company shall suffice to pay, as hereinafter provided, beginning from said 1st of July, 1891, the first semi-annual payment of interest to accrue as of the 1st day of January, 1892. The said income bonds shall, among other things, provide that the interest thereon shall accrue and be payable in each and every year only out of the net income of said New Jersey Company if sufficient, after paying its present fixed charges on its issue of $10,000,000 Collateral Trust Bonds, its current expenses, and the six per cent. cumulative dividends on $6,500,000 of its Preferred Stock, but before its common or general stock shall receive or be paid or entitled to any dividend. The interest on said income bonds shall be payable in each year only out of net income of such year as aforesaid, and shall not be cumulative; that is to say the income of one year shall not be used to provide for any previous deficiency nor to provide for any future payments. Said bonds, however, shall contain the provision that in each and every year the party of the first part shall, after paying out of its net income its said present fixed charges, current expenses and six per cent. dividend on said preferred stock, set aside semi-annually, beginning on the 1st day of July, 1892, the

sum of $100,000 before any dividend is paid on or set aside for the common stock, provided the surplus net income of the Company shall be sufficient so to do; or, if insufficient, then such amount of surplus net income, if any, as may have been collected or received; but this provision shall not be cumulative. The said sum of $100,000 semi-annually or such lesser sum as such surplus net income may represent shall be used and applied, if sufficient (first) to pay or provide interest for the current half year on such income bonds then outstanding; and (secondly) the balance, if any, of such sum shall be used for the purpose of redeeming the said income bonds at par, to be drawn by lot in the usual way, or, at the option of said New Jersey Company, instead of drawing the same by lot, such surplus may be used to purchase and cancel said bonds. The principal and interest on said income bonds shall be payable at the office or agency of the New Jersey Company in the City of New York, and the Central Trust Company of New York shall be the Trustee of said issue of bonds. The said income bonds shall further provide that no new bonds ranking prior to or equal to said income bonds shall be issued by said party of the first part without the consent of the holders of seventy-five per cent. of the said income bonds then outstanding. The form and provisions of said income bonds shall be such as may be agreed upon by the counsel for the respective parties hereto, and such bonds shall be lithographed or engraved, executed and delivered with all convenient speed.

ELEVENTH.—The party of the first part shall have the right and option to deliver to said parties of the second part shares of its said common stock, at par, in lieu of any or all of said income bonds, less the coupons for interest past due at the time of making such delivery, which coupons shall be paid to the parties of the second part. Should such income bonds be delivered prior to the first day of May, 1892, then and in that event said New Jersey Company shall have the right and option until such last mentioned

date, to exchange any of its said common stock at par for any or all of said bonds with their coupons not then due.

TWELFTH.—The parties of the second part covenant and agree that they will hold and not alienate, dispose of or transfer any of said income bonds, for the period of eighteen months from the date hereof, and will at all times during the period of five years from the date hereof, hold and own at least $1,000,000 of said bonds, and not alienate, dispose of or transfer said $1,000,000 of bonds during said term of five years. If, however, any shares of stock be delivered in lieu of or in exchange for bonds as aforesaid then and in that event, the said parties of the second part shall, at all times during said term of five years, own and hold, and not alienate, dispose of or transfer $1,000,000 par value of such stock, if so much, be delivered in lieu of or in exchange for bonds, but if insufficient, then all shares of stock so delivered and sufficient bonds to make the total holding $1,000,000 par value in bonds and stock shall be held for said period of five years. If, however, more than $1,000,000 of stock be so delivered or exchanged, then and in that event, the parties of the second part shall be at liberty to sell and dispose of any surplus of stock over $1,000,000 par value as and when they may desire so to do.

THIRTEENTH.—Should there be any delay in the execution and delivery of said income bonds for any cause whatsoever, any and all amounts due and payable on said income bonds, whether for interest or redemption purposes, shall in the meantime be deposited with the Central Trust Company of New York, to be held as Trustee under this agreement.

FOURTEENTH.—Any and all previous agreements heretofore executed and now existing between the parties hereto are hereby cancelled and annulled.

IN WITNESS WHEREOF, the said party of the first part has, by resolution of its Board of Directors, duly caused these presents to be signed in its name by its Vice-President, and its seal to be attested by its Secretary, and the parties

of the second part have affixed their hands and seals—these presents being executed in duplicate.

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY,
By JOHN QUINCY ADAMS,
Vice-President.

Signed in the presence of:
WM. D. GUTHRIE,
29 Nassau Street,
New York City.

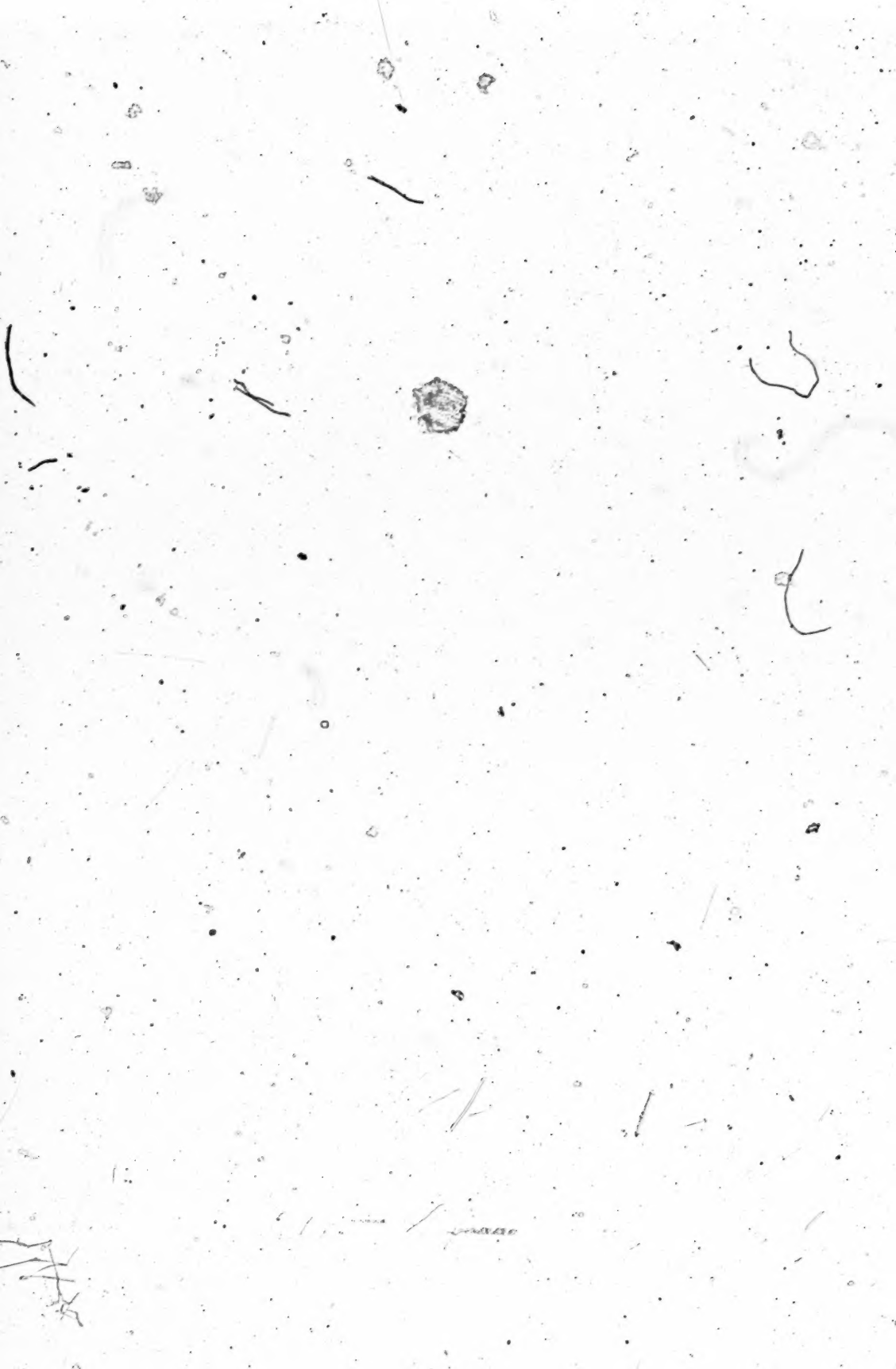
Attest:
WM. C. LANE,
Secretary.

ARMOUR & CO.,
JONATHAN O. ARMOUR,
GUSTAVUS F. SWIFT,
EDWIN C. SWIFT,
NELSON MORRIS & CO.,
By A. H. VEEDER,
Attorney,
PHILIP D. ARMOUR, JR.,
GEORGE H. WEBSTER,
NELSON MORRIS & CO.,
EDWARD MORRIS,
FRANK E. VOGEL,
EDWARD F. SWIFT,
LOUIS F. SWIFT,
NELSON MORRIS,
PHILIP D. ARMOUR.

Signed in presence of
EDWARD J. MARTYN,
205 La Salle St.,
Chicago, Ill.

Respectfully submitted,
EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,
Counsel for Appellants.

January 21, 1942.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR INTERVENOR, ARMOUR AND COMPANY

CHAS. J. FAULKNER, JR.,
JOHN POTTS BARNES,
PAUL E. BLANCHARD,
Counsel for Intervenor.

January 27, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR INTERVENOR, ARMOUR AND COMPANY.

Introduction.

The appellants have written a comprehensive brief of its position in this case, asserting many errors on the part of the Commission and of the District Court, which have to do with errors of omission or commission in matters of fact.

While intervener entirely supports appellants on such assertions, this brief is written upon the assumption that every finding of fact made is supported by substan-

tial evidence; that the evidence requires no findings which were not made, and that each finding of the Commission has been found by this Court to be true, correct and adequately supported by evidence. Such consideration involves no reference to the record save to that portion as sets forth the decision of the Commission, *viz.*, pages 34-57.

This brief will start with that point, and attempt to establish that even so, there remain patent misinterpretations and misapplication of principles of law to such facts. And we shall attempt to prove such errors by application of simple rules of grammar and etymology to the Statute in question, and by analysis of the decisions of this Court relating to the subject matter.

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Statutes Involved.

This brief involves three portions of two sections of the Act to Regulate Commerce, as follows:

Section 1(3):

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Section 1(4):

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *"

Section 15(5):

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations."

Opinions of the Tribunals Below.

The cause was originally decided by the Interstate Commerce Commission on June 21, 1939, in an opinion reported at Volume 238 I. C. C. Rep. 179.

The cause was decided by the District Court of the United States for the Northern District of Illinois on June 4, 1941, the decision appearing at pages 90-98 of the record, but not officially reported.

Grounds on Which Jurisdiction Is Invoked.

Appellants and intervener seek a direct review by the Supreme Court of a final judgment of the United States District Court for the Northern District of Illinois, in a suit to set aside an order of the Interstate Commerce Commission other than for the payment of money, as provided in Sections 47, 47a and 345 of Title 28, U. S. C. A., and other statutes quoted at pages 1-8 of the Statement of Jurisdiction heretofore filed herein.

Intervener's right to become a party appellant is grounded upon its participation as a party of record in the proceeding before the Commerce Commission, and upon the provisions of Section 45a of said Title.

The cases believed to establish jurisdiction of this Court are those cited at pages 13-14 of the Statement as to jurisdiction heretofore filed herein, and particularly:

Rochester Telephone Corporation v. *United States*, 307 U. S. 125; 83 L. ed. 1147; reversing *Procter and Gamble Co.* v. *U. S.*, 225 U. S. 282; 56 L. ed. 1091.

Statement of the Case.

A statement and history of the proceeding, and of the issues presented below is fully set forth at pages 9-12 of the Statement as to jurisdiction heretofore filed herein, and at pages 4-10 of appellant's brief herein and at pages 179-184, inclusive, of the Commission's decision, and should not be repeated here.

Summarizing, the case involves the right of a consignee of livestock (1) to receive a tender of free delivery on shipments of livestock unloaded at public stock yards, and (2) the right of a consignee of livestock to compel delivery of livestock at a point other than a public stock yards, when a free delivery through such yards is refused.

Specifications of Assigned Errors.

Reference is hereby made to pages 787-791 of the Printed Record herein, for a succinct statement of the errors of the tribunals below.

For reasons stated in the Introduction hereto, this brief will involve principally the first error there assigned, to wit:

> "The District Court erred in failing to find that section 15(5) of the Interstate Commerce Act did not supersede or modify the provisions of section 1(3) of said act with respect to the delivery of live stock at public stock yards; that the legislative history of section 15(5) of the Interstate Commerce Act does not support the conclusion of the Commission to the effect that section 15(5) was intended to supersede or modify section 1(3) of the Interstate Commerce Act or the law of the *Covington* case as to unloading and delivery of live stock by railroad common carriers at public stock yards; and that the interstate transportation of live stock to

the railroad defendants' station at the Union Stock Yards in Chicago does not end until after unloading for delivery or tender to the consignee at said destination, as specified in assignments of error Nos. 9, 10, 11, and 12."

The Question To Be Decided.

From the foregoing viewpoint this brief presents but one question for decision. That question, and its background, may be stated thus:

In its decision of the *Covington* case (139 U. S. 128) this Court established certain common law duties which were imposed by law upon common carriers of livestock, with regard to the provision by such carriers of facilities through which livestock might be delivered, and required the extension of the use of those facilities to the consignee of a shipment without extra charge above the line-haul transportation rate.

The Commission (at page 191 of the decision) concedes that this rule is still the law of the land, except in case of livestock transported *to a public stock yard.* As to such traffic, the Commission holds that Section 15(5) of the Act, enacted in 1920, (1) in effect repealed the decision of the *Covington* case as to such traffic, and (2) limited the broad language of Section 1(3) of the Act.

In the last analysis, here is the sole question presented:

Did the enactment of Section 15(5) of the Commerce Act, modify the duty of a common carrier of livestock, and provide a different standard for delivery at a public stock yard than obtains for delivery of the same shipment at any point other than a public stock yard?

We contend that this question must be answered in the negative, and has been answered in the negative by specific pronouncement of this Court.

Summary of Argument.

1. The Commission is without power to relieve a common carrier of an obligation imposed by common law, or by statute, on any ground.

(a) The Commission has relieved the common carriers from liability arising from collection of an extra charge for mere unloading, although such charge is specifically forbidden by the statute.

(b) The Commission has so interpreted the statute as to completely relieve a common carrier from any common law or statutory liability to move the traffic in line haul.

(c) The Commission has interpreted the statute so as to relieve the carriers of any obligation to make a free or tender a free delivery at a public yard without extra charge above the transportation rate.

(d) The Commission has so interpreted the statute as to vest in the carriers themselves the power to change, at will, their legal obligation inherent in delivery, regardless of contract, or regardless of duties imposed by law, and contrary to the expressed desire of, or contract with the owner of the property.

ARGUMENT.

An obligation imposed upon a common carrier by common law, or by statute cannot be abolished by an administrative tribunal.

It is axiomatic that when a carrier accepts a carload of livestock and signs the bill of lading, certain obligations are imposed upon that carrier. Some of those obligations arise from the terms of the contract. Others are imposed by law, being inherent in the common carrier status, or specified by statute.

If a carrier is to be relieved from any duty so imposed, we may assume that such relief must spring from a change in the basic law itself. This the Commerce Commission cannot do. If done, it can only be done by legislation.

To illustrate: when a common carrier contracts to transport a carload of woolen piece goods from New York to Washington, the law imposes upon that carrier the obligation of supplying a vehicle in which woolen piece goods may be safely transported. The Commission may not, by administrative fiat, remove that legal responsibility from the carrier's shoulders, by the device of considering the reasonableness of the obligation imposed by law.

So, if the carrier transports the goods in an open-top (gondola) car, and they are ruined by rainfall, the Commission is without power to enter an order, to the effect that the legal requirement, that woolen goods must be shipped in a watertight box car is an unreasonable one, which the carrier need no longer observe. Our courts have held repeatedly that a carrier is, *as a matter of law*, liable to the owner of goods, for damages resulting from their transportation in an unsafe car. There is no administrative tribunal which may alter or affect that liability.

Another common law duty imposed upon every common carrier, at the moment it contracts to carry livestock, is the obligation to tender or make a free delivery of the property transported. This duty, and its extent, is clearly defined by this Court in its recent decision in *Union Stock Yd. & T. Co.* v. *U. S.*, 308 U. S. at 219; in its earlier decisions in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, 136 and *Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468; and by numerous decisions of the Federal Courts of lower rank. The *Covington* decision recites, not only what the contracting carrier must do, but what the con-

tracting carrier must *not* do. The Commission is without power to relieve the carrier of that duty.

The Commission erroneously asserts that the Congress has relieved common carriers of the duty to effect a free delivery of livestock at public stock yards.

The Commission appears to recognize the general application of this principle; *viz.*, that one of the obligations imposed by law upon a carrier under its contract of carriage is to effect a free delivery to the consignee; for in its decision, at page 191, the Commission said:

> "Decisions are cited, which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station."

The Commission does not at first blush undertake, *sui generis*, to relieve the carrier of this legally imposed duty to deliver. Rather it asserts that Congress itself has changed this obligation by statute. It concludes the above quotation as follows:

> "This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for *in a particular section of the act.* †
>
> "The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section."

Thus appears the basic and fundamental question presented to this Court for consideration. This Court, in the *Covington* * case defined requirements imposed by law upon common carrier deliveries of livestock. Did the

* 139 U. S. 128, 136.

† All emphasis in this and later quotations are by the author.

enactment of Section 15(5) in 1920 congressionally reverse that decision?

Congress in 1906 had imposed the statutory duty upon all common carriers to "provide and furnish transportation,"—and had defined the "transportation" to be "furnished" as inclusive of *"all* services in connection with the * * * delivery * * * and handling of property transported." Did the later enactment of Section 15(5) in 1920 write into this statutory requirement of 1906 the words "except as to livestock destined to public stock-yards"?

If it did not, the decision of the Commission collapses, as a *mere administrative attempt to rewrite the basic and statutory law of common carriers;* and an administrative attempt to overrule or reverse three prior decisions of this Court to the contrary.

The Commission's reasoning in support of its interpretation of Section 15(5) as amendatory of the carriers' common law and statutory duties, naturally divides into two parts:

(1) The interpretation of the statute itself;

(2) The decisions of the Commission and of the courts.

We shall next consider these subjects.

The Commission has ignored or misconstrued the plain language of Section 15(5), and has relieved the carriers of an obligation imposed by the very statute relied upon.

The Commission's interpretation of Section 15(5) completely ignores and denies the ordinary meaning of two words, and one phrase of that section. The phrase is, "without extra charge therefor to the shipper, consignee or owner." The words are "delivery" and "include."

THE COMMISSION APPROVED AN EXTRA CHARGE FOR MERE UNLOADING, THOUGH FORBIDDEN BY STATUTE.

The clear meaning of the clause above referred to, is to provide, in Section 15(5):

1. That "all necessary service of unloading and reloading enroute" shall be *"without extra charge therefor to the shipper, consignee or owner."*
2. That *"delivery at public stockyards of inbound shipments into suitable pens"* shall be *"without extra charge therefor to the shipper, consignee or owner."*
3. That "receipt and loading at such yards of outbound shipments shall be *"without extra charge therefor to the shipper, consignee or owner."*

Accepting the Commission's theory for the moment: "Transportation" did not "end" under this section until there had been a "delivery *into* suitable pens *without extra charge* to the consignee," the appellant.

The Commission's own findings of fact *negate that any such* delivery was *ever* made.

> "The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable to all livestock received at the Union Stock Yards. *These charges* are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and *are assessed and collected* by the Yard Company on every animal unloaded from railroad cars at the stockyards." (Page 182.)
>
> * * *
>
> "Since the beginning of its operations the Yard Company has *assessed and collected* from the shipper a yardage charge for every animal unloaded * * *." (*Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179 at page 183.)

> "From the beginning, all shippers were required to pay to the Yard Company a yardage charge *on every animal unloaded at the yards.*" (Page 185.)

The only possible conclusion to be drawn from these three findings of fact is that the yardage charge attaches *because of mere unloading into suitable pens.* Therefore there *is* a "charge to the shipper" for the mere "delivery into suitable pens." Section 15(5) requires that "delivery into suitable pens" shall be "*without* extra charge to the shipper."

Thus the Commission's own findings establish that they have approved and acquiesced in an "extra charge to the shipper" which charge is assessed on *"every animal unloaded"* on its premises, irrespective of whether the shipments were direct shipments to a packer, or whether they were consigned to a commission merchant for sale." The findings are that the yardage charge arises *on mere unloading* into suitable pens; that such *is* a transportation service; yet the Commission denies jurisdiction of "extra charges" for the transportation service of unloading *in face of a statutory prohibition of any such charge.*

Further consideration of the Commission's findings accentuate this disregard of the phrase "without extra charge to the shipper," etc. Witness:

> "The Yard Company notified complainant" (appellant) "that it would not be permitted to take possession of direct shipments *at the unloading pens* unless the yardage charges were paid * * *" (p. 183).

At the moment of this notification *nothing had been done but unloading.* There had been *no* tender of delivery,—*no* use of other stock yard facilities. Yet the yardage charge was due *at that moment.*

Was this a *"delivery* into suitable pens without extra charge to the shipper" as Section 15(5) requires?

Clearly, the yardage charge was demanded *for mere unloading* and the Commission so finds (pp. 182, 183, *supra*):

> "The line haul carriers pay the Yard Company for the unloading service, and *absorb* the charge made for such service *out of their line haul rate.*"

Why, then, did they continue to employ this agent, with full and *advance* knowledge that their selected and paid agent *would not* "unload into suitable pens *without extra charge to the shipper*" as Section 15(5) required. Were they not *particeps criminus* in this violation of the law?

The Commission's findings of fact convict it of refusing jurisdiction of a charge levied on *"every animal unloaded,"* at the moment of unloading, in face of the clear inclusion of unloading as a part of "transportation," even under its own restricted interpretation of Section 15(5) of the Act.

THE COMMISSION ERRONEOUSLY READS "DELIVERY" IN SECTION 15(5), AS SYNONYMOUS WITH "TRANSFER," AND THEREBY RELIEVES THE CARRIER OF ANY OBLIGATION TO DELIVER.

The next etymological error of the Commission is found in its construction of the word "delivery." The Commission reads Section 15(5) as though it read, the *"transfer* of the stock from cars into suitable pens."

There is an obvious difference between "delivery" and "transfer." "Delivery" is used in Section 1(3) of the Act as well as in Section 15(5). There is nothing to connote any difference in the meaning of the word in one section compared with the other. The difference is that in Section 1(3) the "delivery" of the property transported is unrestricted as to place. In 15(5) the place of delivery is specified as to livestock *i.e.* "suitable pens."

By use of the word "delivery" we must assume that

Congress meant *delivery of possession;* not the mere physical movement of the property without any tender of the property to the consignee, or of any opportunity being afforded him to accept his property without further service being rendered thereon.

The specific findings of the Commission require the conclusion that mere transfer—the mere physical movement—of the animals from car to ground, ends "transportation" *before the consignee has been afforded the slightest opportunity to receive possession or control of his property.*

Let us start at the moment the carrier's engine spots the car at the unloading dock. Admittedly they are still in course of "transportation," since they are still in carrier possession and control; up to that moment they have never been tendered to anyone; no notice of arrival has been given; nor has possession as yet been offered to the owner. The Commission finds:

> "When the livestock reaches the unloading platforms, *no one is permitted by the Yard Company to handle* the animals except employees of that Company." (Page 182.)

This finding negates any possibility of the consignee doing his own unloading and going his way with his property. Now what is the state of affairs at the moment unloading, a transportation service, is completed?

> "The Yard Company notified complainant, that it *would not be permitted to take possession* * * * *at the unloading pens* * * * unless the yardage charges were paid." (Page 183.)

The Commission finds that transportation ends *before any opportunity has ever been given* the owner of the property to handle or take possession of his property. Just before this decision this Court had said: that transportation ended "only after unloading *for delivery*

or tender to the consignee." (*Union Stk. Yds. & T. Co.* v. *U. S.*, 308 U. S. at 219.)

The Commission's specific findings are that there was *never* an unloading of these animals for such delivery or tender, except upon the payment of the required ransom; an "extra charge" for *mere unloading*.

THE COMMISSION HAS IGNORED THE SIGNIFICANCE OF THE WORD "INCLUDE" IN SECTIONS 1(3) AND 15(5) OF THE ACT, WITH INCONGRUOUS RESULTS.

Section 15(5) provides that transportation of livestock shall "include" three specific services:

1. Unloading and reloading en route.
2. Delivery at public stock yards of inbound shipments into suitable pens.
3. Receipt and loading of outbound shipments

all to be rendered "*without extra charge* therefor to the * * * consignee."

The Commission reasons that the recitation of these three services as being *included* in "transportation," *excludes every other* service of transportation, not specifically named in that section.

Elsewhere in the Act we are told (see Sec. 1(3)) that "transportation" of any property shall *include* "all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt" (of outbound shipments) "delivery" (of inbound shipments), * * * storage, and handling of property transported.

Thus, each of these sections, 1(3) and 15(5), uses the word *"include."* If the Commission's interpretation is correct, and the word "include" eliminates *all other* unnamed transportation services, we *must* reach the absurd conclusion that the carrier *need not move the*

freight in line haul at all. The Act (see Sec. 1(3)) requires them, as part of "transportation" to "receive," "deliver," "transfer in transit," "ventilate," "refrigerate or ice," "store," and "handle" but *nowhere does the Act require the carriers to "haul."* Likewise Section 15(5) requires carriers of livestock to "unload and reload en route" to "deliver into suitable pens" and to "receive and load." But *nowhere does it require the carriers to haul.* The necessary consequence of the Commission's logic would be that the Commerce Act *does not require the carriers to actually haul.*

The duty imposed by the Act is to provide and furnish "transportation" "upon reasonable request therefor" (Sec. 1(4)).

But the Act *does not specifically define hauling as a part of transportation.* Nor does it specifically define free egress from the point of unloading. The same reasoning which absolves the carriers from any obligation to provide free egress, *also absolves them from hauling.* On this theory, the carriers may observe their entire duty to "furnish transportation" merely by providing for the origin, destination and transit services, named in Sections 1(3) and 15(5). Hauling is not named as a transportation service.

This absurdity arises from the Commission's failure to comprehend the ordinary, dictionary and colloquial significance of the word "include," as used in both sections considered, *viz.*, 1(3) and 15(5).

Funk and Wagnalls dictionary defines "include" as:

> "To comprise, comprehend, or embrace, *as a component part, item or member.*"

Thus, all that Congress has done in these sections is to say that "refrigeration," "storage" and "unloading into suitable pens without extra charge," etc., shall each be *a component part of that "transportation" which the*

statute requires the carriers to "furnish" "on reasonable request therefor."

Transportation at common law included many services. Haulage was probably the first. Delivery or tender of the property to the consignee was another. As to livestock, the maintenance of free delivering pens was another. (*Covington Stock Yards* v. *Keith*, 139 U. S. 128, 136; *Erie R. R.* v. *Shuart*, 250 U. S. 465, 468.) This legal duty existed both before and after the passage of the Commerce Act. (*Union Stk. Yd. & T. Co.* v. *U. S.*, 308 U. S. at 219.)

All that Congress did by Sections 1(3) and 15(5) was to *add to*, the carrier's *common law* duties, the *specific services named in those sections*, by "including" them in the term "transportation," along with the common law duties. The Commission reasons that, concurrently with the addition of these new parts of "transportation" the Congress *relieved the carriers of all other parts of that function* not specifically mentioned in the Statute.

As stated before, if that was the result, the duty to haul the freight was necessarily removed from the carrier's obligation; for in the language of the statute, *haulage is nowhere "included" as a part of "transportation."*

The Commission has misinterpreted its own prior decisions and the prior decisions of this Court.

Following the erroneous construction of Section 15(5) itself, the Commission next argues that a certain decision of this Court, and a prior decision of their own, provide a precedent for their holding that Section 15(5) established a new standard for the carriers' duty to deliver at public yards; permitting "transportation to end" before any tender of delivery to consignee; and at

a place accessible to him only on payment of an "extra charge" for mere unloading, forbidden by law.

We shall first consider the Commission's prior decision in *Southwestern Horse and Mule Assn.* v. *A. T. & S. F. Ry. et al.*, 129 I. C. C. 730:

> *Since the decision in the Southwestern Horse and Mule case, the Commission has pointed out that in that case, its finding that transportation ended at the unloading pens, was grounded upon the fact that a free delivery and free egress was available to the consignee, and that no yardage charge was required to obtain possession or remove the property.*

The case above referred to is cited not only as an authority for the point that transportation ends at the unloading pens, but also as an instance where appellant and this intervenor have presented a position different from that taken here.

Fortunately the Commission's own subsequent description of the issues of that case not only destroys the case as authority for the point in question, but completely absolves these parties from any inconsistency of position.

The author of this brief personally argued that case before the Commission. While we could go into great detail as to the proof of the Commission's present erroneous assertions as to its decision, and their uncomplimentary imputations as to our consistency, it is not necessary to do so.

In a later case before the Commission, the defending railroads urged the Commission to accept that very decision as authority for the carrier's theory that transportation ended at the unloading pens. The Commission refused, pointing out the vitally different factual basis between the facts in the *Southwestern* case, and the

facts in the case then before them. That distinguishing fact was that the consignee was there afforded *adequate means of accepting a delivery without charge* and removing the property. He rejected them; refused to use them; and demanded a route across the Yards property which suited his needs better than the free route and free delivery provided. Our position before the Commission was that the carrier's transportation ended with the consignee's rejection of the free egress provided, and that the Commission was without jurisdiction to consider a separate and distinct contract for the use of particular Yards property, the use of which was not necessary to effect that free delivery which the carriers had to furnish, had furnished, and which had been rejected.

This statement is established by the Commission's own later description of the *Southwestern* case, in *E. Kahn's Sons Co.* v. *B. & O. R. R. Co.*, 192 I. C. C. 705 at page 710, the Commission said:

> "We there expressed the view that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards, and that this marks the limit of our jurisdiction over such shipments. We found that we were without jurisdiction to determine the issues respecting the yardage charges assailed. *In that case,* as in the instant case, *adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges.*" (Emphasis ours.)

In the case at bar, an extra charge was assessed for mere unloading, and no opportunity for free egress from the point of unloading was ever afforded. The Commission specifically finds this to be the fact.*

Thus, the *Southwestern* case, properly understood, presents a distinguishing circumstance which makes it wholly inapplicable to the case at bar, and completely relieves this intervener from the Commission's innuendo of inconsistency. The rule of that case is that transportation ends at the unloading pens, *provided a means of free delivery and free egress has been provided, and been rejected by the consignee.* Certainly, when the consignee is given possession of his shipment without charge, and he is given the free means to go on his way, transportation ends at that point. If in the case at bar appellant had ever been given free possession of its animals, and a free means of taking them away, it would have no standing in this case, concerning charges resulting from an independent dicker he had made with the Yards Company, for use of some means of removal *other* than the free means provided, had there been such.

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* *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179, at pages 181, 184-185, 183:

"It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property." (p. 181.)

* * *

"Because of the physical situation at the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company." (pp. 184-185.)

* * *

"The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees." (p. 183.)

The Commission has interpreted the decision of this Court in Atchison, Topeka & Sante Fe Ry. v. U. S., 295 U. S. 193, far differently than this Court has since interpreted it.

The number of times that the Commission repetitiously describes this Court as having held that "transportation ends at the unloading pens" is not without significance. As though seeking self-assurance by repetition, twice on page 190 of the decision; once on page 191; again on page 195; twice in one paragraph on page 196; the reader is repetitiously assured that in the above case, this Court held the "transportation ended when the animals are placed in the unloading pens." And upon that repeated but uncertain ground, is based the Commission's interpretation of Section 15(5) as wholly abolishing the common carrier duty of tendering delivery to the consignee and of unloading at public stock yards without extra charge to the consignee.

The Commission's reliance upon its interpretation of this Court's language in the *Atchison*[1] case brings into bold relief, some uncertain language found in that decision, against the background of pronouncements of this Court, made both before and after the *Atchison* decision.

If in the *Atchison*[1] case, this Court meant what the Commission assumes, the *Atchison*[1] case reversed in part, the prior decisions of this Court in the *Covington*[2] and *Adams*[3] cases; and was itself reversed by this Court in the *Union Stock Yards*[4] case, decided little more than one year ago.

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[1] *Atchison, T. & S. F. Ry. v. United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

[3] *Adams v. Mills*, 286 U. S. 409, 76 L. Ed. 1192, 52 S. Ct. 589.

[4] *Union Stock Yards & T. Co. v. United States*, 308 U. S. 213, 84 L. Ed. 198, ... S. Ct. .....

The alternative is, of course, that the Commission's interpretation of the *Atchison* [1] case is unsound, in which event, that decision follows the two prior decisions (in the *Covington* [2] and *Adams* [3] cases) and is itself in harmony with the later *Union Stock Yards* [4] case.

To adopt the Commission's interpretation of the *Atchison* [1] case is to create amongst the precedents of this Court's decisions, authorities on both sides of the case at bar, clearly requiring the present selection of one doctrine, or the other. To reject the Commission's interpretation is to harmonize the four decisions, and to align them squarely and unanimously behind the appellant.

In each of the four cases referred to, this Court dealt with the legal duty of a common carrier by railroad, when it delivered livestock to a public stockyard, selected by it as its railroad livestock terminal. In three of them, the yard involved was the very yard here involved—Chicago.

In each of the four cases this Court was considering the measure of the delivering service which a rail carrier was obligated to render in consideration of its line-haul freight rate.

In the *Covington* [2] case this Court held that a common carrier could *not* lawfully do what the Commission has here held it *might* do—use the device of a leased delivering station as a lever with which to pry, out of a consignee of livestock, moneys purporting to be consideration for a service of unloading, and for use of facilities of another, which the consignee did not need nor desire. In fact the sole breach of the carrier in that case was its exclusive use of a separately owned public stock yard

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[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

[4] *Union Stock Yards & T. Co.* v. *United States*, 308 U. S. 213, 84 L. Ed. 198, ... S. Ct. .....

as its delivering station; with the resulting imposition of extra charges upon a consignee with whom the carrier had contracted for delivery without extra charge. Certainly this Court did not hold in that case that the carrier's common law duty ended when it dumped Keith's livestock in the center of a third person's stock yard, leaving Keith to his own resources to get to them and remove them, and only at extra expense to him.

This holding was affirmed in *Adams* v. *Mills*.[3] There this Court specifically passed upon the *degree of service* which the railroad purchased, *for its consignee*, when it paid the unloading charge to its agent, the Yards Company. This Court held that payment of that charge entitled the consignee; *not* merely to the dumping of the stock into the first pen at hand, leaving it to the consignee to get at, and remove them, as best he could. On the contrary, this Court held that the payment made by the carrier to the Yards Company, purchased for the consignee, the service, *not merely of unloading* into the first pen at hand, but "*all service performed in connection with the shipment* up to and *including placing of the stock in the pens of the Commission men.*" (286 U. S. 397, 413-414.)

The "Commission men" referred to were the consignees just as Armour and Swift are consignee in the case at bar. Their pens, were and are, often a half mile or more from the "unloading pens" at which the Commission would terminate all legal liability of the carrier. Thus, this Court has held that the portion of the line-haul rate comprising the unloading charge, covers a delivery *by the carrier*, at a point in the yards *far removed from, and far beyond the unloading pens.*

The next pronouncement of this Court was that made

[3] *Adams* v. *Mills*, 286 U. S. 409, 76 L. Ed. 1192, 52 S. Ct. 589.

in the *Atchison* [1] case, which the Commission assumes to be authority for its position that when a carrier, through its agent, and wholly without tender of delivery, dumps the shipment into the first pen at hand, its legal duty to its consignee is completely fulfilled, without notification of arrival, without delivery, or without providing for the owner's ingress to, or egress from, the point of dumping. If the Commission has correctly read the mind of this Court, then the *Atchison* [1] decision reverses the *Covington* [2] and *Adams* [3] cases. (We shall show later that this decision is wholly consistent with those two prior cases, and that the error is found in the Commission's interpretation.)

But assuming that this Court *did* reverse the *Covington* [2] and *Adams* [3] cases by the *Atchison* [1] case, and *did* thereby judicially change the legal liability of a carrier delivering livestock, as the Commission has assumed, we find that this Court has later reversed the *Atchison* [1] case and reaffirmed the *Covington* [2] and *Adams* [3] cases, in its latest pronouncement concerning this delivering obligation of a common carrier of livestock. In the *Union Stock Yards* [4] case, this Court again considered the liability of a common carrier as to the delivery of livestock transported to the Chicago Yards and held that the transportation duty of the railroad ended "only after the unloading for *delivery or tender to the consignee.*" (From 308 U. S. 213 at 219.)

As we shall later show the Commission, in the case at bar, makes no finding that there was *ever any unconditional tender or delivery of the animals in question to*

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[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

[3] *Adams* v. *Mills*, 286 U. S. 409, 76 L. Ed. 1192, 52 S. Ct. 589.

[4] *Union Stock Yards & T. Co.* v. *United States*, 308 U. S. 213, 84 L. Ed. 198, ... S. Ct. .....

the consignee. On the contrary it finds that *there was neither.* And still it finds that the carriers fulfilled their legal duty to deliver, without actual delivery or tender of delivery, a duty held by this Court, in its latest pronouncement, to be essential to the completion of transportation by a common carrier.

Summarizing, we have:

1. The *Covington* [2] case, wherein this Court held the carriers to be duty-bound, either to provide a free delivery place, even when a public stock yard was involved, or to effect a free delivery at some other place at the same station. This carries the railroads' transportation duty far beyond just any unloading pen selected by the carrier, regardless of its accessibility or freedom of use.

2. The *Adams* [3] case, wherein this Court described the part of the line-haul rate assigned to cover unloading, as also covering a service *far beyond the mere unloading,* and *including a delivery in the distant pens of the consignee,* the Commission men.

3. The *Atchison* [1] case.

4. The *Union Stock Yards* [4] case, wherein the service of common carriage was held terminated, *not* by mere unloading, but by "delivery or tender of *delivery to the consignee.*"

1, 2 and 4 above, are entirely consonant and consistent with each other. And so is 3, if the basic facts and

[1] *Atchison, T. & S. F. Ry. v. United States,* 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co. v. Keith,* 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

[3] *Adams v. Mills,* 286 U. S. 409, 76 L. Ed. 1192, 52 S. Ct. 589.

[4] *Union Stock Yards & T. Co. v. United States,* 308 U. S. 213, 84 L. Ed. 198, ... S. Ct. .....

questions of that case be studied, and the Court's language interpreted in the light thereof.

The consignee in the *Atchison*[1] case was a packing company. As to certain of its inbound shipments, it was its practice to appear at the unloading pens, and take *possession of its stock*. This was a free *delivery of possession* to the consignee. Having taken possession, the consignee began to dictate, to dominate and *control the movement* of the animals. It said to the Yards Company, in effect: "Open *that* gate. Let me pass my animals through *these* specific alleys and over *that* particular viaduct of yours. Now let me through *that* particular tunnel of yours."

Each command so given to the Yards Company by Hygrade, after it had obtained possession of its animals, created an *implied contract* to pay the Yards Company for the *use of the facilities so demanded*. Not one service or facility demanded was a facility *necessary* t free delivery and removal.

With this factual and contractual background before us, we may now correctly interpret this Court's language:

> "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties *for this service* from mere egress such as *is* included in transportation of livestock to destinations other than public yards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

We call attention to the Court's careful selection of the words "for this service" *i.e.* the service of using a

[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

particular gate, a *particular* viaduct, a *particular* tunnel, and a *particularly* favorable short route. The demands for use of these especial facilities created *new contracts* for services other than transportation. And it was these demands "for this service" made *after* consignee had received possession of his animals, that distinguished the case from one, like the case at bar, where bare possession was demanded and refused, and mere egress, via *any* route, selected by the railroads, or its agent, was summarily denied.

We also note this Court's use of the words *"an essential* difference" in contrasting the factual and contractual status existing in the *Atchison*[1] case, with that in the *Covington*[2] case, where mere egress to *any* point, via *any* route, was all that was demanded.

And we note the limiting effect of the words "at least in respect to these shipments." These shipments were shipments as to which the consignee had *taken possession;* as to which he demanded a *special* and *particular* use of yards facilities selected by him, not any facilities necessary for any egress which the carrier might select. By that language we believe this Court was trying to preserve the doctrine of the *Covington*[2] case and *Adams*[3] case, and preserve to consignees the right to *some* free egress, via *some* route, guaranteed by those previous pronouncements.

We believe that a clear alternative is presented.

1. If this Court decides that the Commission has correctly interpreted the *Atchison*[1] decision, then this Court should reverse that decision, and adopt its later decision in the *Union Stock Yards*[4] case, and

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[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.
[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.
[3] *Adams* v. *Mills*, 286 U. S. 409, 76 L. Ed. 1192, 52 S. Ct. 589.
[4] *Union Stock Yards & T. Co.* v. *United States*, 308 U. S. 213, 84 L. Ed. 198 ..... S. Ct. .....

hold that under the law, a common carrier is bound to deliver or tender delivery of livestock, to the consignee at a public stock yard.

2. If the Court decides that the *Atchison*[1] decision covered only cases where, *after* delivery, special stock yard services and facilities were hired by the consignee, the Court should reverse the Commission in its application of that decision to a case where no free delivery was ever had, no tender of free delivery was ever made, and no use of any yards' property was desired or needed except some place to walk in and accept delivery, and some place to walk out with the delivered property.

We need go no further than the Commission's findings of fact to establish that no free delivery or tender of free delivery was ever made to Swift, at the unloading pens or elsewhere, nor was any free egress of any kind ever provided; nor did Swift ever demand the use of any particular facility, as did Hygrade. We quote the Commission's findings:

"It is physically impossible to remove livestock from the unloading pens in the Stockyards to complainant's plant *or to the public streets*, except by use of the Yards Company's property." (Page 181.)

"Complainant does not request or desire that any of its direct shipments be held or placed in loading pens. It is prepared to have crews of men at any hour of the day or night to move its stock from the unloading pens." (Page 184.)

"When the livestock reaches the unloading platforms, no one is permitted by the Yards Company to handle the animals except employees of that Company." (Page .....)

"These charges" (yardage) * * * "are assessed and collected by the Yard Company on *every animal*

[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

unloaded from railroad cars at the stockyards." (Page 182.)

* * *

"The Yard Company notified complainant that it would *not* be permitted to *take possession* of direct shipments at the unloading pens unless the yardage charges were paid, * * *." (Page 183.)

Properly interpreted the decision in the *Atchison* case goes no further than to imply, that where, after delivery, the consignee demands a special service or facility, *not necessarily a part of transportation*, an extra charge therefor is not unlawful.

In the last analysis, the case goes no further than the *Southwestern Horse and Mule* case (129 I. C. C. 730) where, as we have shown, the Commission denied its jurisdiction over a charge made for a special stock yard service, contracted for *after* the property had been delivered and free egress provided. In the *Southwestern* case, it specifically appeared that a free means of delivery was at hand, but refused. The *Atchison*[1] case is silent on the subject.

The Supreme Court has had several opportunities to reverse the doctrine of the Covington[2] *case and to hold that Section 15(5) amended the rule of that case but has specifically refused to do so.*

Section 15(5) has been a part of the Act for twenty-two years. During that twenty-two years, none of the great jurists, none of the great Commissioners, who have occupied positions upon the bench of this Court, or of the Commission, have ever so interpreted that section of the Act. Yet repeatedly during those twenty-two

[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

years has the opportunity been afforded both tribunals to do so. Consistently, during those years has this Court and the Commission followed and cited the *Covington*[2] case as the law of the land. And each of these instances occurred *after Section 15(5)* appeared on the Statute books.

The most important decisions of this Court to which we refer, all decided since the passage of Section 15(5) are *Adams* v. *Mills*, 286 U. S. 409; and *Union Stock Yards & Transit Co.* v. *United States*, 308 U. S. 214. The first case involved the very liability imposed later by Section 15(5). The latter case involved the effect of Section 15(5) upon a carrier's liability.

The *Adams* case was decided in 1932, twelve years after the passage of Section 15(5) of the Act. That case involved the question of whether the obligation, later imposed by paragraph 15(5) as to unloading livestock at public stock yards, had existed before the passage of that section, as a matter of common law. This Court held that the obligation of the carriers to unload livestock at public stock yards existed even before the passage of Section 15(5). In other words the effect of that decision is to hold that Section 15(5) *added no new duties* or liabilities to common carriers of livestock at public stock yards.

That duty was found to exist *at common law. How, then, can its later codification affect another common law duty to effect a free delivery?*

This common law obligation imposed upon the common carriers as to unloading livestock at public stock yards was not an obligation imposed as to any other freight, or as to livestock at destinations other than stock yards. This Court said:

> "Throughout the United States, the duty of unloading carload freight rests ordinarily upon the

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

consignee.. See *National Lumber Dealers' Association* v. *Atlantic Coast Line R. Co.*, 14 Inters. Com. Rep. 154, 160. But continuously for fifty years prior to 1917, livestock had been unloaded at Chicago by the Stock Yards Company, without charge therefor to the shipper or consignee. Compare *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136, 35 L. Ed. 73, 76, 11 Sup. Ct. 469." (From *Adams* v. *Mills*, 286 U. S. at 410.)

We pause to inquire as to the propriety of this Court's citation of the *Covington* case in 1932, if (as the Commission argues), the doctrine of that case had been congressionally reversed, twelve years before.

And, if the *Covington* case had thus been destroyed by legislation twelve years earlier, what of the following language of this Court (emphasis ours) in the same decision? (from *Adams* v. *Mills*, 286 U. S. at 414):

"Thus, by the unbroken usage of fifty years the payment by shippers of livestock of the line-haul rate to Chicago, plus the terminal charge of $2, had covered *all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commissionmen. The Commission so found: and this Court has heretofore so recognized.* See *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, 327, 329, 336, 46 L. Ed. 1182, 1187, 1188, 1191, 22 S. Ct. 824; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108, 54 L. ed. 112, 114, 30 S. Ct. 66. Beyond dispute, the Yards Company in the services which it performed, regarded itself as the carriers' agent. This appears not only from the previous course of business, but from the terms of its second tariff, from its initial conduct with respect to collection of the additional charge and from its attempt to cancel all its tariffs. The carriers for years had paid the Yards Company all its charges; and there was testimony that both the $2 terminal charge

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

and the line-haul rates were predicated upon such payment. The company's charges, moreover, which constituted its sole compensation, covered *services, other than the mere unloading of cars,—services which were obviously performed for the benefit of the carriers rather than the shippers.*"

This language offers the key to the Commission's error. The term "unloading" is not synonymous with the term "delivery." It was not so regarded by this Court. The closing language above quoted clearly shows that unloading was, in the especial case of livestock delivered at public stock yards, *an addition* to the other delivering duties of the common carrier. In no sense was it a *substitute* for those other duties. Where, in the *Covington* case this Court decided that *one* duty imposed by law at *all* destinations was that of providing pens into which unloading might be done, it now decided that the labor of transferring the stock from the cars into those provided pens, was *another* duty *also* imposed upon the carriers, by common law.* There is no word or syllable in the decision warranting the assumption that the unloading duty was to be *substituted* for the duty of providing free unloading pens.

On the contrary it was held that the charges which the carriers paid to their agent, the Yards Company, were paid for other transportation services "other than mere unloading of cars—services which were obviously performed for the benefit of carriers rather than shippers." Amongst these "other" services, were the furnishing of the facilities and pens required by the *Coving-*

* The defendants here were parties to the case discussed. There they argued to this court that the status of the Yards Company as a carrier was determined by this Court's decision in *Adams* v. *Mills* (see 84 L. ed. at page 202). Thus they there adopted and concurred in the prior pronouncement of this Court that transportation of livestock included "services other than mere unloading of cars" and "covered all services performed * * * including the placing of the stock in the pens of the commissionmen."

ton case, and the "placing of the stock in the pens of the commissionmen" previously referred to in the same decision.

Certainly this Court had no conception at that time, in 1932, that Section 15(5) had done any more than codify the common law on the same subject. Certainly this Court did not consider that the twelve-year-old Section 15(5) had in any way changed the law of delivery by common carriers. On the contrary it was but the codification of a pre-existing common law duty.

Passing for the moment the intervening *Atchison* case, and we come to another golden opportunity for this Court to have declared that Section 15(5) had amended the law and reduced the obligation of a carrier delivering livestock at public stock yards.

In *Union S. Y. & T. Co.* v. *U. S.*, 308 U. S. 213, 84 L. ed. 199, this Court had before it, the dual function of this very Stock Yard Company, as a common carrier under the Commerce Act and as a stock yard company under the Packers and Stockyards Act. And it discussed that question with particular consideration being given to the boundary line between the transportation facilities and services of the Yards Company and to those devoted to yardage. The specific question appearing in the opening sentence in this Court's opinion, was:

> "The principal question for decision upon this appeal is whether, in the services performed by appellant in loading and unloading livestock at its stockyards in Chicago, and specified by its tariffs filed with the Interstate Commerce Commission, it is a common carrier subject to the Interstate Commerce Act."

If in fact Section 15(5) had the effect given it by the Commission, this Court's decision would have been extremely simple. It could have said, Section 15(5) defines the end of all transportation to be the completion of

unloading. All services and facilities rendered up to that moment are transportation. All rendered thereafter are yardage.

But this Court did not adopt that simple reasoning. In effect it rejected it. At page 218 it specifically cites the statutory definition of "transportation" and as including "all services in connection with the receipt, delivery * * * and handling of property." It cites this very statute in a case where the carrier's duties as to livestock deliveries were involved. Such citation and use would have been impossible if, nineteen years before, Section 15(5) had amended Section 1(3) by writing into the latter section the words "except as to livestock at public stock yards," at least by implication.

In the same decision the Court considers Paragraph 15(5) in immediate conjunction with Section 1(3) (which the Commission urges it amended) and summarizes the law as follows:

> "*Without the aid of these statutes* the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stockyards Co.* v. *Keith*, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461. The same rule has been repeatedly applied since the statute was adopted. *Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468, 63 L. ed. 1088, 1090, 39 S. Ct. 519; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 198, 79 L. ed. 1382, 1387, 55 S. Ct. 748, and cases cited, *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469, 58 S. Ct. 990; 2 Hutchinson, Carriers, 3d ed. sec. 510. Appellant is thus engaged in the performance of a railroad transportation service and provides railroad 'terminal facilities' and services. It is a 'carrier' engaged in 'transportation of property wholly by railroad' as those terms are defined by the words of the statute."

Thus, following specific quotation of Sections 15(5) and 1(3) this Court states the law to *be the same, since* those sections were passed as it was *before* they were passed, and that the legal duty of the carrier ended "only after unloading for delivery or tender of delivery to the consignee." The immediately succeeding citation of the *Covington* [2] case clearly implies that the "delivery" referred to, meant the free delivery without extra charge, imposed by the *Covington* [2] case.

This was the holding of the Supreme Court of United States on December 4, 1939. Four months later, with full knowledge of this decision with a copy in the possession of each Commissioner, the Interstate Commerce Commission flatly refuses to follow this Court in the case at bar, by holding that Section 15(5) repealed the application of Section 1(3) to livestock delivered at public stock yards, and entirely nullified the *Covington* [2] case as to such shipments.

We feel it would be anti-climax to now point out that in the case at bar, the Commission has completely reversed itself. It has decided previous cases, wherein it was claimed by railroads,—yes, urged—that Section 15(5) had amended Section 1(3) and congressionally reversed this Court's decision of the *Covington* [2] case.

In 1933, the Commission after quoting Section 15(5) had this to say as to its effect upon the delivering duties of a carrier of livestock to public stock yards (*Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, at page 558):

> "Defendants point out that the assessment of yardage charges is the established practice at stockyards throughout the United States and has been the practice of the Chicago yards over 60 years. They argue that the purpose of section 15, paragraph 5, of the act was merely to provide for the unloading of animals without extra charge. It is

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

here demonstrated that *there are no services performed after unloading for which defendants may assess charges,* in instances where delivery is taken at the unloading pens. It appears that at some of the stockyards such delivery may be obtained without extra charge."

* * *

"We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

The Commission, ignoring this decision, places great stress upon the fact that in the *Southwestern Horse and Mule* case it held that transportation ended when the unloading was completed at the public yards. We have already established the fallacy of the Commission's reliance upon that decision (p. 20, *supra*).

This Court has cited the Atchison[1] *case as being in complete accord with the Covington*[2] *case.*

Just a few months before the Commission's decision in the case at bar, this Court announced a principle in a decision to which we have heretofore adverted. We quote this Court's language emphasizing the principle announced, and emphasizing this Court's citation of the *Atchison*[1] case:

"Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to *end only after unloading for delivery or tender to the consignee at the place of destination. Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461. The *same rule has*

[1] *Atchison, T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

> *been repeatedly applied since the statute* * *was adopted. Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468, 63 L. ed. 1088, 1090, 39 S. Ct. 519; **Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 198,** 79 L. ed. 1382, 1387, 55 S. Ct. 748, and cases cited. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. ed. 1469, 58 S. Ct. 990; 2 Hutchinson, Carriers, 3d ed. sec. 510." (*Union Stock Yard & T.* v. *United States*, 308 U. S. 213, 319.)

Here we find this Court citing the *Atchison*[1] case, side by side with the *Covington*[2] case as authority for the "same rule" that there *must* be a delivery to the consignee before transportation can end. The two decisions are treated as being in utter harmony with each other.

In the same decision this Court describes its own basis for the decision of the *Atchison*[1] case. That description negates any possibility of assuming that the *Atchison*[1] decision was grounded upon any error in the Commission's holding that the defendant carriers were liable for damages resulting from their failure to provide egress from the point of delivery to a public street. That description grounds the reversal of the Commission's decision upon a single error:

> "The Commission's order * * * was set aside *on the sole ground* that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading service * * *." (From *U. S. Y. & T. Co.* v. *U. S.*, 308 U. S. 213 at 219.)

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* "The statute" referred to as having been "adopted" is named in the paragraph immediately preceding the above quotation, and is *Section 15(5)*, which the Commission asserts *changed* the rule of the *Covington* case, and changed the delivery duties of a common rail carrier. This Court refers to Section 15(5) as resulting in the *"same rule"* as was provided in the *Covington* case.

[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

Thus, error in administrative procedure, *not* error in legal interpretation, was the basis for the reversal of the decision of the *Hygrade* case (195 I. C. C. 553).

In the case at bar there is no failure to name the service for which the charge was made. The Commission said, at pages 182 and 185:

> "The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and *are assessed* and collected by the Yard Company *on every animal unloaded* from railroad cars at the stockyards." (Page 182.)
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> "From the beginning, all shippers were required to pay to the Yard Company a yardage charge *on every animal unloaded* at the yards." (Page 185.)
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> * * *
>
> "The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company *would not permit livestock* consigned to complainant *to be delivered* to it or its employees." (Page 183.)

The charges here assessed are found to have accrued because of mere unloading. They are found to be applicable regardless of what service or facilities were thereafter furnished. Yet the statute required this unloading without extra charge to the shipper.

The only conclusion which can be drawn is that the Commission's interpretation of the *Atchison*[1] case is

[1] *Atchison, T. & S. F. Ry. v. United States*, 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

diametrically opposed to this Court's own interpretation of the same decision. Why the Commission, having presumptive knowledge of this Court's own previous interpretation of its own decision, would thus flatly contradict that interpretation, is a question beyond our power to explain.

The Commission's disregard of the two different forms of transportation contract before it implies that a carrier may regulate its own delivering responsibilities as to any shipment handled.

The Commission finds that the appellant made two types of shipping contracts with the carriers, covering the shipments in question (emphasis ours):

> "An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 percent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 percent were delivered to the stockyards, although *delivery at that point was not specified in the livestock contract.*" (Page 189.)

Later the Commission holds that the rule of the *Covington*[2] case applies to all deliveries of livestock except those deliveries made at public stock yards.[*]

Considering these two findings together, and it would seem a necessary conclusion that 84.4 per cent of appellant's shipments would be subject to the Commission's interpretation of Section 15(5), while the other 15.6

[2] *Covington S. Y. Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

[*] "Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. *This is true of traffic generally* but transportation of livestock *to public stockyards* and the delivery embraced therein is provided for in a particular section of the act." *(Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179 at page 191.)

per cent would be subject to the recognized rule of the *Covington*[2] case.

But not so. The Commission allows the actual point of unloading to control the carrier's delivering duties, and wholly disregards the carrier's contractual status as to the particular shipment. If the unloading was done at a public stock yards, that fact controls the carrier's duty, regardless of the terms of the contract between the shipper and carrier, or of the consignee's directions.

The Commission finds, as to this 15 per cent of the appellant's shipments, that they were not billed to the stock yards in the shipping documents. It finds that as to those shipments that appellant had notified the railroads that

> "* * * The Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery except as defendants' agent, would constitute a conversion of complainant's property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest." (Pages 193-194.)

Thus, as to this 15 per cent the Commission finds there was no provision in the shipping contract for delivery at the public yards. It finds that the appellant's specific directions forbade delivery to the Yards Company except at carrier's expense. The Commission points out not one legal justification for the carriers' tender of such shipments to appellant through the public stock yards. It finds that deliveries were being made at other nearby points during this time. (See page 189.) It does not point out that appellant was ever offered a car of livestock at such points.

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[2] *Covington S. Y. Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

As to this 15 per cent the Commission allows the carriers to positively decide what their legal liability shall be upon every shipment handled. Had the carriers elected to tender this 15 per cent on nearby team tracks,* no term of the shipping contract would have been breached. The appellant's instructions would have been obeyed, and the carrier's common law obligation to provide an opportunity for free delivery (recognized by the Commission as existing at every point except a public stock yard) would have been observed. Their election to take this 15 per cent to the public stock yards was not controlled by any provision of the contract. It was utterly disobedient to the owner's instructions. Yet the Commission holds that this *disobedient election changed the legal obligation of the carrier.*

The necessary conclusion is, that *regardless* of contract and *regardless* of the owner's orders, these carriers may subject themselves to the rule of the *Covington*[2] case, or they may obtain the benefit of this constricted interpretation of Section 15(5) *as their own interest* dictates, by electing one facility or the other *as best suits their convenience at the time.*

Speaking more specifically, a shipper may direct shipments to the team track to obtain the benefits of the *Covington* rule. If the carrier elects to deliver there, the shipper receives that benefit. If the carrier elects otherwise he does not. What his rights are; what the carrier's legal duties are, are to be determined *solely by where the carrier elects to unload or offer for unloading.*

We doubt if the Commission itself ever realized this result of their decision, with regard to this 15 per cent of

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* We here assume without admitting, that adequate delivering facilities existed at these team tracks. This assumption is wholly contrary to fact. (See pages 51-52 brief for Appellant.)

[2] *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

appellant's shipments, which were *not* billed to the stock yards, and which were to be taken there only at the carrier's peril.

The basic fallacy in the carriers' case is their unwarranted assumption that the Commission has exclusive and plenary power to "end" transportation wherever it pleases.

Throughout the course of this case before the Commission and the lower courts, counsel for the defending railroads have grounded their arguments upon the premise, "only the Commission has power to determine where transportation ends."

The fallacy in the unwarranted breadth of this assertion would be more apparent to the country practitioner than to the transportation expert. There is not a case involving terminal destruction, theft, or loss of goods transported, in which the courts are not called upon to decide whether, at the time of the loss, transportation had ended or not.

But, entirely ignoring this well-known condition, citing the *American Tin Plate* case (301 U. S. 402), and ignoring that this Court used no language in that decision indicating that the Commission had the *exclusive* power to establish where transportation ends, counsel have grounded their defense upon the unwarranted premise, that the word of the Commission as to where transportation ends, is irrevocable, final and binding upon the courts.

The application of counsel's reasoning, carried one step further, produces absurd results.

In this case, the Commission holds that transportation had ended, *before any tender or delivery had ever*

been made to the consignee; before any notice of arrival had been given; and before any place or method for a free delivery had been provided.

Suppose, on a car of Iowa hogs, the carrier had decided to abandon them, not in the unloading pens, but while in cars on adjacent tracks. Could the Commission, based on evidence of "custom," "usage," and "1891 contracts," lawfully decide that transportation ended in cars on tracks, in the face of a specific statute requiring the carrier to unload?

The statute requiring unloading, and the law of the *Covington*[2] case are equally applicable to the shipment. If the Commission *can* decide that transportation ended before the duties of the *Covington*[2] case were performed, *why cannot the Commission decide it ended before the duties of the unloading statute were performed?*

Carrying this ridiculous theory one step further. Regardless of the fact that the bill of lading names Chicago as the destination, this theory would endow the Commission with power to declare the "transportation" of a car of hogs, *billed to Chicago,* "ended" out at Freeport or Rockford, or finally, to "end" it before the car is ever hitched to a train at the Iowa origin.

The law imposes upon the carrier the duty to carry to the contractual destination. The Commission is powerless to declare the "transportation ended" short of that point. The law requires the carrier to unload at public stock yards. The Commission is powerless to declare "transportation is ended" before unloading is done. The law also requires the carrier to tender a free delivery to the consignee. The Commission is equally powerless to declare "transportation ended" before that duty is performed.

An analysis of the *American Tin Plate* case (301 U. S.

[2] *Covington S. Y. Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

402) will reveal the same factual difference as that existing in the *Southwestern Horse and Mule* case (129 I. C. C. 730); and in the *Hygrade* case (195 I. C. C. 553), viz.:

A free delivery had been provided and offered; the transportation had been completely performed; *and a separate and additional service was involved in the case.*

The factual difference between the American Tin Plate case (301 U. S. 402) and the case at bar.

When the factual situation facing the Commission and the courts in the *American Tin Plate* case (301 U. S. 402) is contrasted with the factual situation here, the impropriety of the Commission's order in this case is emphasized.

In the *American Tin Plate* case the carrier *had made a free* delivery of the shipment, on the tracks of the consignee. The consignee had assumed control of the shipment, and dictated when the further move, into the plant area, should be made. The Commission held that this additional move was mere plant switching, made *after the shipment had been fully delivered* by placing the shipment on the consignee's tracks.

No such delivery was ever made here. At no time was the livestock made accessible to the consignee, to be handled thereafter as he directed, as was done in the *Tin Plate* case. The livestock was never placed on consignee's tracks, and subsequently moved by the carrier at consignee's direction. Here, the action involved was a *part of* and *essential to any* lawful delivery. There the action involved was one occurring *after* a lawful delivery had previously been made.

Here, the Commission invaded the consignee's legal right to *any* delivery. There the Commission cancelled

his right to receive, without charge, *any* further service *after a lawful delivery had been* made. The *Tin Plate* case could be a parallel to this case, only if the carrier there had spotted the shipper's cars on the private tracks of a *third party* to which consignee had *no* free access, and forever after refused to place it on carrier's own team tracks, or on the industry tracks of the consignee, or at any other point where consignee could accept delivery and take his property away without extra charge.

CONCLUSION.

The Commission has exceeded its power, and deprived appellant and intervener of valuable rights, by holding:

1. That it has no jurisdiction to compel separation of extra charges assessed for, made for mere unloading, a part of transportation, when such collection is prohibited by a Statute the Commission is sworn to administer.

2. That the mere unloading of livestock at a public stock yard completely absolves a carrier from the duty of making or tendering a free delivery of property transported, to the consignee, at destination.

3. That a carrier has the power to fix or alter its own statutory and common law duties as well, by merely electing to place the property for unloading, at a public stock yard or elsewhere.

Each of these holdings contravenes a legal duty imposed upon common carriers by statute or by common law, only the Congress has power to relieve common carriers from the duties imposed upon them by law.

The District Court should be reversed. The case should be remanded to the Commission for further consideration by it within the field of its proper jurisdiction, under the mandate of this court in these respects:

1. A common carrier of livestock must make or tender a free delivery of livestock unloaded at public stock yards.

2. That no extra charge may be levied against the shipment by the carrier or by its unloading agent, where the sole service received by consignee is delivery, and ingress to and egress from the point where delivery is tendered.

3. That a carrier may not alter its common law duties by any manipulation of the service of unloading or of delivery.

Dated at Chicago, Ill., Jan. 27th, 1942.

Respectfully submitted,

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No. 595

In the Supreme Court of the United States

OCTOBER TERM, 1941

SWIFT & COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The District Court delivered no opinion. The findings of fact, conclusions of law, and final decree of the court appear in the printed record at pages 90–98. The report of the Interstate Commerce Commission (R. 34–57) is reported in 238 I. C. C. 179.

JURISDICTION

The final decree of the District Court was entered on June 4, 1941 (R. 97). A petition for appeal was filed on July 10, 1941 (R. 99), and was

allowed the same day (R. 101). Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221 (U. S. C., title 28, secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., title 28, sec. 345). Probable jurisdiction was noted on October 13, 1941.

QUESTION PRESENTED

Whether a rail carrier of direct shipments of livestock in carload lots to the Chicago Union Stock Yards is required by the Interstate Commerce Act to furnish, as a part of the carrier's transportation, egress to a public street from unloading pens in the stockyards which the Commission has found to be suitable pens within the meaning of section 15 (5) of the Act.

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and of the Packers and Stockyards Act are set forth in the Appendix, *infra*, pp. 41–42.

STATEMENT

Swift & Company and its wholly-owned subsidiary, Omaha Packing Company, initiated a proceeding before the Interstate Commerce Commission on September 20, 1937, against several common carriers by railroad engaged in transporting

livestock to Chicago. Their complaint alleged in substance that the carriers failed to afford egress from unloading pens at Union Stock Yards in Chicago to the nearest public street for direct shipments [1] of livestock consigned to appellants, free from any charge other than the line-haul transportation rates, and that this was an unreasonable practice under section 1 (6) of the Interstate Commerce Act (U. S. C., title 49, sec. 1 (6)).[2] (R. 35.) The Commission was asked to require the carriers to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens to public streets free from the payment of any charges other than the line-haul rate (R. 35–36). Reparation was also sought, but the Commission's decision left no basis for an award, and no question of reparation is now involved. Armour & Company intervened before the Commission in support of the complaint. (R. 36.)

The relevant facts, which are not in dispute, may be summarized from the Commission's report (R. 34–57).

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[1] The term "direct shipments" refers to livestock that is consigned directly to a packer at Union Stock Yards, as distinguished from a shipment consigned to a commission merchant at the stockyard for sale (R. 36).

[2] The tracks of the line-haul carriers do not reach the stockyards; delivery is effected over tracks owned by the Yard Company and leased to the Chicago River and Indiana Railroad Company (R. 38).

Union Stock Yards is owned and operated by the Union Stock Yard & Transit Company and is the principal terminal for rail-borne livestock entering Chicago (R. 37). The Yard Company, with respect to part of its business, has been held to be a common carrier by railroad subject to the Interstate Commerce Act (R. 37–38).[3] It is also a stockyard owner, as that term is defined in the Packers and Stockyards Act, and as such is subject to regulation by the Secretary of Agriculture (R. 38).[4] It was not, however, named as a defendant at any stage in the present proceedings (R. 54, 1).

Direct shipments of livestock consigned to Swift at the Union Stock Yards are transported by the railroads from country origins to unloading platforms on the property of the Yard Company (R. 36).[5] When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals except employees of that company; this practice is necessary for the efficient and orderly handling of the large number of shipments arriving at the yards (R. 38–39). Employees of the Yard Company open the car

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[3] *United States* v. *Union Stock Yard Co.*, 226 U. S. 286; *Union Stock Yard Co.* v. *United States*, 308 U. S. 213.

[4] 42 Stat. 159 *et seq.* (U. S. C., title 7, secs. 201–229).

[5] The Commission found that the bulk of the traffic with reference to which complaint was made was consigned to Swift, and for convenience treated that company as if it were the sole complainant (R. 35).

door and drive the livestock through chutes into unloading pens adjacent to the unloading platforms (R. 36). The railroads pay the Yard Company for the unloading service performed by it, and absorb the charge made for this service out of the line-haul rates (R. 42). The unloading platforms, chutes, and pens are owned by the Yard Company (R. 36). If employees of Swift are present at the unloading pens when the animals are placed therein, they drive the animals from the unloading pens through the property of the Yard Company to Swift's plant located outside the stockyards (R. 36).[5] If employees of Swift are not at the unloading pens when the animals are placed there and if the volume of livestock arriving at the unloading pens is sufficient to require immediate removal of the animals, employees of the Yard Company drive them from the unloading pens to holding pens, located throughout the stockyards; later, employees of Swift drive the animals from the holding pens through the Yard Company's property to Swift's plant (R. 36–37).

Swift is required to pay a yardage charge on each animal whether possession of the animals is taken at the unloading pens or at the holding pens by Swift's employees (R. 36–37). This charge is assessed, collected, and retained by the Yard Company on every animal unloaded from railroad cars

[5] Swift's plant is located in an area known as Packingtown, immediately west of the stockyards.

at Union Stock Yards, under authority of a tariff filed by the Yard Company with the Secretary of Agriculture (R. 37). With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, scales, and alleys and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities (*e. g.*, for holding, watering, and feeding) pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold. (R. 38.)

The animals consigned by direct shipment to Swift are intended for immediate slaughter and are not fed or watered in the yards; since 1933 they have not been weighed on the scales of the Yard Company (R. 40–41). Swift stated before the Commission that it is now prepared to have crews of men ready at all times to remove its stock from the unloading pens upon arrival and that it does not request or desire that any of its direct shipments be held or placed in holding pens. It demands that the railroads accord it the right to take immediate possession of the animals at the unloading pens and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the

payment of any yardage charges. Swift does not demand egress over a particular route or at a particular point, but simply egress to a public street via the shortest or most convenient route, to be designated by the railroads. (R. 41.) Since May 25, 1933, in each instance in which Swift has paid yardage charges on direct shipments it has done so under protest and at stated intervals has rendered bills against the railroads for the amount of the yardage charges so paid to the Yard Company (R. 28–31, 40).

Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice of consigning it to the Union Stock Yards, and having it unloaded there without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case they unload the cars themselves. The Commission found that although the facilities available at such team tracks for the unloading of livestock are not extensive and do not include pens into which the stock may be unloaded, they have been found ample for the shipments that have been placed on the tracks for unloading and that many carloads of livestock, consigned principally to small packers, are received and unloaded in this way. In addition, under the tariffs of the line-haul carriers, the packers, including appellants, may, if they choose, specify delivery of direct shipments

on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. (R. 46.)

More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. The Commission found that direct shipments of livestock are unloaded at the Union Stock Yards only when appellants elect to take delivery there. (R. 46.) At the hearing before the Commission it was stated that practically all of Swift's direct shipments are now being consigned to the plant of its subsidiary, Omaha Packing Company, located approximately two miles from the Union Stock Yards, rather than to Union Stock Yards, the stock being then transported by motor truck over the streets of Chicago to Swift's plant. By having its shipments so consigned Swift is relieved of the payment of yardage charges. (R. 39.)

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail movement to the Union Stock Yards of 94,629 cars (R. 52–53). The shift from producers' consignments to direct consignments is rapidly increasing (R. 53). The Commission found that because of the physical situation at the Union Stock Yards, the railroads could not provide egress from the unloading pens to a public street except by use of the property

of the Yard Company, including alleys, ways, and in some instances overhead viaducts belonging to it (R. 41, 48). The Commission also stated that "the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago" (R. 53).

Since 1865, when the Yard Company began operation, there has been a uniform line of demarcation at Chicago between the services which shippers received in return for the transportation charges and the services received from the operation of the stockyards. The line-haul carriers have paid the Yard Company for the unloading service and absorbed the charge for this service out of the line-haul rates (R. 42). However, the railroads never have performed services after the unloading of direct shipments of livestock transported to the Union Stock Yards and they have not been compensated by shippers for any services performed at the stockyards after placing of the animals in unloading pens; the responsibility of the carriers has terminated with the unloading. The rates applicable on livestock transported to the stockyards have not included any allowance to cover yardage service, nor have the carriers had any voice in the nature of the yard services provided, or in the manner in which they have been performed. (R. 45.) From the beginning of operations at the Chicago stock-

yards all shippers have been required to pay to the Yard Company a yardage charge on every animal unloaded at the yards whether the stock was consigned directly to a packer for immediate slaughter or to a commission merchant for sale (R. 29, 42). The yardage services and facilities have been furnished solely by the Yard Company and the dealings with respect to these charges have been solely between the Yard Company and the shippers (R. 42, 45). The amount of yardage charges has been determined solely by the Yard Company, except that since 1921 it has set its rates under the supervision of the Secretary of Agriculture.

Some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards", near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago

or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded in litigation instituted in the courts of Illinois that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards. (R. 43.)

These steps taken by the packers resulted in the execution of an agreement dated January 15, 1892, by representatives of some of the larger packing companies with the Chicago Junction Railway[7] and Union Stock Yards Company of New Jersey (a holding company which owned practically all the stock of the Yard Company) (R. 41–43).[8] By the terms of this contract, which was to run for 15 years, the packers agreed to convey to the New Jersey Company the Indiana site and the Central Stock Yards, to dismiss the suits filed in the state courts, to refrain from filing similar suits during the life of the agreement, and to continue their business at Packingtown for 15 years from July 1, 1891. The packers guaranteed that any and all livestock slaughtered by them on their premises or within 20 miles of Chicago during the period

[7] This carrier was the original operating lessee of the Yard Company's stockyard tracks; in 1922 it sublet to the Chicago River and Indiana Railroad. See *Union Stock Yard Co. v. United States*, 308 U. S. 213, 216; n. 2, p. 3, *supra*.

[8] A similar contract was made on the same date between Union Stock Yards Company of New Jersey and certain smaller packers.

should pass through and use the Union yards, with payment of the usual yardage charge, and that the Yard Company should receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to the packers at the Chicago yards the aggregate sum of at least $2,000,000 within six years. They also agreed that as long as the Yard Company conducted its business at Chicago they would not acquire an interest in any other stockyards in Chicago for the receipt and use of their own livestock. (R. 43.)

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey holding company in the amount of $3,000,000. Swift received approximately one-third of these bonds, which were subsequently redeemed by the issuer. (R. 43.)

The railroad companies were not parties to this agreement, and the Commission has found that there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, it found that the action of the packers shows that at the time of this agreement the packers did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned. At the expiration of the agreement, in 1907, the stockholders of the New Jersey Company were informed that the packers were again

threatening to move their plants from Chicago and that some arrangement must be made to hold them. Swift expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive any return in addition to the bonds received under the contract of 1892. (R. 44.)

After the enactment in 1920 of section 15 (5) of the Interstate Commerce Act,[9] which imposed upon railroads the duty of making delivery of ordinary livestock at public stockyards into suitable pens, the Yard Company continued to collect its yardage charges on all direct shipments. And after the enactment in 1921 of the Packers and Stockyards Act the Yard Company proceeded to file its tariffs covering these charges with the Secretary of Agriculture in accordance with the provisions of that Act. (R. 51.) No complaint was ever made by the livestock producers who sponsored section 15 (5) concerning the payment of these yardage charges (R. 51–52), and the packers continued to acquiesce in assessment of the charges (R. 52).

The packers' interpretation of the carriers' duty is also shown by affirmative action. In the first proceeding involving the application of section 15 (5) to yardage charges on direct shipments,[10] the

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[9] See Appendix, p. 41, *infra*.

[10] *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry.*, 129 I. C. C. 730.

Fort Worth Stock Yards Company, whose policies were controlled by Swift and Armour through ownership of 66.8 percent of its capital stock, successfully contended that the Interstate Commerce Commission had no jurisdiction of the yardage charges because under section 15 (5) the transportation of livestock to public stockyards terminated with delivery into the unloading pens (R. 52). It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest yardage charges were being assessed on direct shipments of livestock (R. 52).[11]

The Commission concluded concerning the practice with respect to direct shipments:

> For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company,

[11] The Commission selected the date of July 1, 1928, because at that time the packers were in unlimited possession and control of the voting stock of the yard companies to which the Commission referred (R. 52).

> and by other acts hereinbefore described, * * * have made it their own. (R. 54–55.)
>
> * * * * *
>
> For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago. (R. 46.)

The Commission found also that in the administration of the Packers and Stockyards Act the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards, and that the yardage charges now applicable at the public stockyards of St. Joseph, Missouri, Denver, Colorado, and Omaha, Nebraska, for the use of facilities and services of the yard companies in connection with egress for direct shipments, are those prescribed by the Secretary (R. 53, 54).

The Commission made the following ultimate findings:

> We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that

> the yardage charges assessed by the Union Stock Yard and Transit Company of Chicago on direct shipments of livestock, as defined in this respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.
>
> We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice. (R. 55.)

Accordingly, on April 8, 1940, the Commission dismissed the packers' complaint against the railroads (R. 34, 35, 55), and on July 8, 1940, denied a petition for reargument and reconsideration (R. 57). On October 7, 1940, appellants Swift and Omaha brought suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to have the Commission's order set aside (R. 1). Appellant Armour intervened and participated in the trial (R. 74, 120). The railroads which had been named as defendants before the Commission also intervened, as defendants in the District Court (R. 62–74). The court delivered no opinion but on June 4, 1941, made findings of fact and announced conclusions of law, sustaining the Commission's order (R. 90–

97). On the same day the District Court entered a final decree dismissing the bill of complaint (R. 97).

SUMMARY OF ARGUMENT

I

The question, in particular cases, of where a railroad's duty ends in transporting direct shipments of livestock to public stockyards is one for the administrative judgment of the Interstate Commerce Commission, since decision of the question is complicated by many and difficult problems of transportation for the solution of which expert determination is required. The judgment of the Commission on such a question should not be disturbed if warranted by the facts of the case. Here, the Commission's conclusion that the carriers' obligation terminates at delivery of animals into unloading pens is clearly supported by long usage and the physical conditions which exist at the Chicago Stock Yards.

II

If, however, appellants' contention concerning the nature of this case be accepted, that the issue raised is one of law only and may be determined independently of administrative adjudication, the Government and the Interstate Commerce Commission contend that the applicable rule of law is

not that which appellants advance as controlling. The decisions of this Court, the administrative practice, and the legislative history of the statutes governing railroad transportation at public stockyards combine to show that the carriers' duty in this case ends with unloading into suitable pens and does not extend to providing free egress for unloaded livestock through the property of the stockyard company out to a public way.

ARGUMENT

Appellants urge the existence of a positive requirement of law that direct shipments of livestock be delivered into the unrestricted control of the consignee free of all stockyard charges; they premise their contention on the theory that the duty of a railroad in connection with the transportation of stock does not terminate at the unloading pen if the shipper-consignee elects to take possession at that point and itself remove the animals immediately and directly from the yard. Accordingly, they attack the Commission's disposition in this case as not conforming to the supposed rule. The United States and the Interstate Commerce Commission, however, take the position that no universal rule of law exists to govern cases such as the present, and, in the alternative, if a positive rule controls that it is not the rule contended for by appellants.

I.

THE COMMISSION PROPERLY DETERMINED THAT TRANSPORTATION OF DIRECT SHIPMENTS OF LIVESTOCK IN CARLOAD LOTS TO THE CHICAGO UNION STOCK YARDS ENDS WITH DELIVERY INTO UNLOADING PENS

A. THE QUESTION OF WHERE A CARRIER'S DUTY ENDS IS FOR THE ADMINISTRATIVE JUDGMENT OF THE COMMISSION

In *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, the intervener here presented to a federal district court the same argument which appellants have made in this litigation. See *id.* at 195–196, 197–200, 202. On appeal, this Court affirmed a dismissal of the packer's complaint on the ground that primary jurisdiction was lodged in the Interstate Commerce Commission, to which prior resort must be had. The Court stated that the facts alleged in the complaint revealed that "there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock." 312 U. S. 200. By way of illustration the opinion detailed several questions which would arise; significantly, the Court inquired:

> *First.* At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.

The decision agreed with the view of the railroads and the courts below that "adjudication of the issues presented relates to such complex transportation problems that determination of the legal questions must necessarily be preceded by the consideration of extensive evidence in a specialized field, and that decision of such questions is by statute vested exclusively in the Interstate Commerce Commission." *Id.* at 197.

The effect of the *Armour* case is to make clear that the Commission is endowed with discretion to decide at what point railroad transportation ends under particular circumstances, and, in consequence, to determine whether the practice of the carriers in the present case is reasonable and lawful. The decision there is an application of the rule underlying the decision in *Atchison Ry.* v. *United States*, 295 U. S. 193. In that case shippers filed complaints with the Interstate Commerce Commission charging, *inter alia*, that the collection by the Chicago stockyard company of yardage charges on livestock delivered to the consignee at unloading pens was an unreasonable practice in violation of the Interstate Commerce Act. The Commission held that the complainants were entitled to reparation with respect to the charges imposed. This part of the Commission's order was set aside on appeal to this Court. The opinion pointed out that in appropriate circumstances the Commission might properly find that

the carriers' duty to deliver livestock ended with delivery into suitable pens at a public stockyard, and stated that the Commission's order was defective because it was not based on definite findings as to what constituted complete delivery or where transportation ended in the two types of situation there under consideration. The decision thus recognized that the question of where the carriers' obligation ends is for the administrative judgment of the Interstate Commerce Commission.

The 1920 amendment to the Interstate Commerce Act embodied in section 15 (5) now makes it clear as a matter of law that the obligation of a carrier to deliver livestock at a public stockyard includes the unloading of the shipments into suitable pens. But prior to that amendment even the question of the carriers' obligation to unload was not considered a pure question of law but one for the exercise of the Commission's discretion. *Adams* v. *Mills*, 286 U. S. 397. In that case the sole issue was whether the Yard Company at Chicago was entitled to impose an extra charge of 25 cents (collected by the carriers and not absorbed by them) for unloading shipments of livestock. This Court upheld a ruling of the Commission that the collection of the charge was unlawful, saying:

> Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely

> reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. [286 U. S. 409–410.]

Clearly, the decision in *Adams* v. *Mills* foretold the decisions in the *Atchison* and *Armour* cases. If it was for the Commission to decide whether the carriers' obligation to transport extended to unloading, equally it was a question for the Commission whether the duty of the carriers extended beyond unloading. Although Congress has settled by statute that railroads must assume the obligation of unloading direct shipments of livestock in carload lots into suitable pens at public stockyards, the Commission still has the responsibility of determining whether in particular cases the duty extends beyond that point.

B. THE COMMISSION'S DETERMINATION WAS WARRANTED BY THE FACTS OF THE PRESENT CASE

It remains to be considered whether the undisputed facts set forth in the Commission's re-

port justify its ultimate conclusion that in this case transportation ends with the unloading of livestock into suitable pens and that the carriers were under no duty to provide free egress from those pens.

In undertaking to determine where transportation ended, the Commission was confronted preliminarily with a serious practical consideration. Direct shipments of livestock to packers at Chicago for several years before the Commission's decision had exceeded 30,000 carloads annually, nearly one-third of the entire rail movement to the Yards. The Commission noted that a substantial shift from producers' consignments to direct consignments was progressing rapidly (R. 53). For this reason and because of the physical conditions at the Yards, the Commission stated that "the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago" (R. 53).

A consideration of the usage and long-standing practices at the Chicago Stock Yards strongly supports the solution of the problem reached by the Interstate Commerce Commission. It found that since the establishment of the Yards more than seventy years ago the Yard Company has assessed and collected from the shippers a yardage charge on every animal unloaded on the premises, irrespective of whether they were direct

shipments to a packer or were consigned to commission merchants for sale (R. 39, 42). The line-haul carriers, while paying the Yard Company out of their line-haul rates for the unloading service (R. 42), have never performed services on direct shipments after unloading, and have never been compensated for any services performed at the stockyards after the placing of the animals in unloading pens; the line-haul transportation rates have not included any allowance to cover yardage service (R. 45).

For many decades packers not only paid these yardage charges on direct shipments without protest and acquiesced in the practice as a reasonable one, but in 1892 by a contract with the Yard Company to which the railroads were not parties, specifically guaranteed the earnings from such charges for a limited period and agreed to give up their own stockyard facilities for direct shipments in return for income bonds of the Yard Company's parent corporation (R. 43, 46). After the expiration of this contract appellant Swift expected to receive a share of the Yard Company's earnings, even as late as 1918 (R. 44).

Moreover, upon the enactment of section 15 (5) no complaint was made by the livestock producers, who sponsored that amendment, concerning the payment of these yardage charges, and until 1933 the packers paid without protest the yardage charges, on direct shipments, contained in

tariffs filed by the Yard Company with the Department of Agriculture under the Packers and Stockyards Act of 1921 (R. 51–52). Significantly, in the first case presented to the Interstate Commerce Commission involving construction of section 15 (5) a stockyard company controlled by appellants Swift and Armour successfully took the position that transportation of direct shipments terminated with delivery into unloading pens (R. 52). *Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry.*, 129 I. C. C. 730. And on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments.[12]

Thus the Commission found in the history of the Stock Yards, of the unloading practices, and of the action of all the parties with reference to the yardage charges convincing evidence that "usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens." *Atchison Ry. v. United States*, 295 U. S. 193, 201. Since the administrative judgment is supported by evidence and is warranted by considerations which this Court has previously held relevant, the determination ought not to be set aside. *Adams v. Mills*, 286 U. S. 397, 409–410.

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[12] The date of July 1, 1928, was selected by the Commission because at that time the packers were in unlimited possession and control of the voting stock of the yard companies referred to (R. 52).

II

THERE IS NO MERIT IN APPELLANTS' ARGUMENT THAT AS A MATTER OF LAW A CARRIER IS REQUIRED TO PROVIDE FREE EGRESS FOR DIRECT LIVESTOCK SHIPMENTS AT A PUBLIC STOCKYARD

We have urged in Point I that the fundamental issue in this case is whether in appropriate circumstances it lies within the administrative discretion of the Interstate Commerce Commission to determine that a carrier's duty with respect to direct shipments of livestock to a public stockyard ends with the delivery of the shipments into unloading pens. We have contended that the Commission has this authority and that the circumstances of this case fully justify the conclusion which the Commission reached here.

The implicit basis of all of appellants' arguments, on the other hand, is that the question of where the carrier's duty ends has not been committed by Congress to the judgment of the Commission, but is a question which must be decided by the application of a rule of law that is controlling in all circumstances. In our view, the decisions in the *Armour* and *Atchison* cases make this argument untenable. But if the Court should decide in favor of appellants on this issue, the Government and the Commission contend that the appellants err when they assert that a carrier of direct shipments of livestock to public stockyards is required in every case and under all circumstances to provide free egress from unloading pens.

1. *The decisions of this Court.* We think that the decision of this Court in *Atchison Ry.* v. *United States*, 295 U. S. 193, establishes the contradictory proposition, if that decision is not accorded the interpretation for which we have contended in Point I, and bars the relief that appellants have sought in the proceedings in this case. In the *Atchison* case the Commission had held that the collection of yardage charges by the Yard Company at the Chicago Union Stock Yards for shipments which were actually received by the consignee at the unloading pens was an unreasonable and unlawful practice under section 1 (6) of the Interstate Commerce Act.[18]

The railroads sought to have the Commission's order set aside on two separate grounds: (1) transportation ended with unloading of livestock into suitable pens; and (2) the order was void for lack of essential findings of fact. An examination of the briefs in that case reveals that the parties argued both of these issues. This Court discussed both and held (alternatively) that the carriers' obligation at public stockyards ended with delivery of the livestock into suitable pens. With respect to this point the Court said:

> Paragraph 5 of § 15 was passed February 28, 1920, during and presumably with

[18] The Commission's findings and opinion are reported in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry.*, 195 I. C. C. 553.

knowledge of the controversy later brought here in *Adams v. Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yard Company's practice of making a charge for livestock received. The Packers and Stockyards Act approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the receiving, holding and delivery of livestock. Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission. * * * Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose. Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by § 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is

the place where transportation ends. [295 U. S. 199, 201.][14]

The decision is, on the interpretation which is necessitated by the nature of appellants' contentions here, an adverse ruling on the same arguments which appellants now present, for we think there is no substantial difference between the facts there involved and those before the Court here. Appellants insist that the *Atchison* case is distinguishable because there the stock in direct shipment was driven over the scales of the Yard Company and weighed on the way out. But it

[14] Appellant Swift suggests (Br. 25, 79) that this portion of the opinion was in any event only *dictum*. Such an interpretation is untenable; if the Court had accepted the view that shippers had an absolute legal right to free egress, it would have sustained the order whether or not supporting findings of fact had been made.

In arguing that the Court's discussion of this point was *dictum*, appellants rely upon the statement in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 219, that the Commission's order in the *Atchison* case was set aside "on the sole ground" that the Commission's findings failed to show that the service for which the charge was made was a part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish. It seems clear from the context of this statement that it was intended to make plain that the *Atchison* decision was no obstacle to holding in the *Union Stock Yard* case that loading and unloading were transportation services and within the Commission's jurisdiction. Further than that, the statement would serve only to affirm the existence of administrative discretion in the Commission, for which we have contended in Point I.

seems plain that the Court did not regard this single circumstance as controlling.

The opinion stated that the question in that case was not one of mere egress to the public highways. 295 U. S. 201. However, as the Commission pointed out (R. 48), the question here is not one of "mere" egress to the street; the evidence shows that the alleys, ways, and in some instances overhead viaducts belonging to the yard company must be used to remove animals from the unloading pens to the public streets. As the Commission said:

> In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. (R. 48–49.)

In other instances this Court has reaffirmed the doctrine of the *Atchison* case. It has upheld action based on the assumption that the jurisdiction of the Interstate Commerce Commission ended at a public stockyard with the placing of the livestock in suit-

able pens. Thus, in *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, this Court held that the Secretary of Agriculture properly excluded facilities used for the loading and unloading of rail-borne livestock from consideration as part of the rate base in ascertaining proper charges for the stockyards services performed, and stated:

> Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 198. [304 U. S. 477.]

In two cases the Court has reviewed rate orders issued by the Secretary of Agriculture, under the Packers and Stockyards Act, that applied to yardage charges imposed for facilities used for egress from unloading pens, and did not question in any way the jurisdiction of the Secretary of Agriculture to regulate those charges. *Denver Stock Yard Co.* v. *United States*, *supra*; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; cf. *Union Stock Yards Co. of Omaha* v. *United States*, 9 F. Supp. 864 (D. C. Neb.) (R. 54).

Appellants suggest that certain language in the opinion in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, indicates that the doctrine of *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, was there reaffirmed as applicable to public stockyards,

despite the intervening decision in the *Atchison* case. They point to the following language:

> Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128 136. The same rule has been repeatedly applied since the statute was adopted. *Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468; *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 198, and cases cited; *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470. * * * [308 U. S. 219.]

The citations to the *Atchison*, *Shuart*, and *Denver* cases refer to passages in the opinions in those cases which state that the furnishing of unloading facilities is a part of transportation service. In dealing with the issue of whether the furnishing of loading and unloading facilities is a part of transportation service, these cases undoubtedly applied the same rule that had been applied in the *Covington* case. Accordingly, it should not be inferred that this language in the *Union Stock Yard* case was intended to have the broader significance of repudiating the *Atchison* decision.

2. *The administrative construction.* Since the *Atchison* case, the Interstate Commerce Commission has consistently relied upon the language of the opinion there and followed its presumed mandate

in holding that in the case of direct shipments of livestock to public stockyards transportation terminated when the shipments were placed in suitable pens. *Livestock Loaded and Unloaded at Chicago,* 213 I. C. C. 330, 339; *Livestock To Or From Union Stock Yards, Chicago,* 222 I. C. C. 765, 771, 772; *Cancelation of Livestock Services At Chicago,* 227 I. C. C. 716; Ex Parte *No. 127, Status of Public Stock Yard Companies,* 245 I. C. C. 241.

Similarly, the Secretary of Agriculture has disclaimed jurisdiction, under the Packers and Stockyards Act, over charges for unloading livestock into suitable pens at public stockyards. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 223, footnote. And he has taken jurisdiction of yardage charges covering mere egress at many public yards, including the charges here in question (R. 53).[15] The Commission specifically found that the yardage charges now applicable at the

[15] The record shows that the Secretary in 1935 by a formal order instituted a proceeding for the purpose of determining the lawfulness of all the Yard Company's rates and charges at Chicago, including charges on direct shipments (Ex. 37, R. 550). After extended hearings the examiner filed a proposed report and order. Although the report does not appear in the record, it clearly appears from the packers' petition for intervention in that case, that yardage charges on direct shipments, the very charges here involved, were given deliberate consideration and their validity was upheld (Ex. 63, pp. 7, 8, R. 643). The Yard Company thereafter filed its Tariff No. 11 with the Secretary in which it retained its charges on direct shipments to packers (Ex. 67, R. 710).

public stockyards at St. Joseph, Missouri, Denver, Colorado, and Omaha, Nebraska, for use of facilities and services of the respective yards companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary (R. 54).[16]

It is a familiar rule of law that settled construction of statutes by the administrative authorities entrusted with their application will not be lightly

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[16] Appellant Swift contends (Br. 37–41) that the finding was erroneous. However, the record shows that in 1931 the Secretary initiated a general investigation of the charges made by the Union Stock Yards Company of Omaha, Ltd. The yardage charges at that yard were expressly recognized as applying to direct consignments to packers (Ex. 42, p. 6, par. 22, R. 593). Jurisdiction over these charges was taken, and in 1933 they were ordered reduced in amount. In 1937 the order was modified by altering the applicable rate (Ex. 42, R. 593).

In 1934 after an extended proceeding the Secretary issued an order setting certain rates and charges for the St. Joseph (Mo.) Stock Yards Company. It was expressly set forth in the findings that yardage charges were assessed against direct shipments (Ex. 43, p. 9, par. 22, R. 594). The reasonableness of the charges was determined and proper rates prescribed (Ex. 43, p. 74, R. 594). The yardage charges were again considered and the earlier order modified, but only to the amount of the charge, in April 1938 (Ex. 43, R. 594). Similarly, the Secretary has exercised his jurisdiction over such yardage charges at the Denver Union Stock Yard Company. These proceedings were initiated in 1934 and ended in an order dated February 1937, determining that the yardage charges, including expressly the charges "on livestock consigned direct to packers and slaughterers" were unreasonable. Yardage charges on direct shipments were provided for in the new schedule of maximum reasonable charges (Ex. 41, p. 79, R. 592).

disturbed by the courts. *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *United States* v. *Chicago North Shore R. R.*, 288 U. S. 1; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488. In the present case Congress has subsequently taken action that may be regarded as a ratification of the administrative construction. In the Transportation Act of September 18, 1940 (54 Stat. 898–962), an omnibus transportation measure, Congress amended the Interstate Commerce Act extensively. This legislation was enacted only a few months after the Commission had announced its decision in the present controversy, wherein it had reasserted and applied the statutory construction adopted in the *Atchison* case. It is significant, then, that while in this Act Congress made several amendments to certain paragraphs of section 15 (54 Stat. 911, sec. 10), it did not alter the provisions of paragraph 5 of that section. Cf. *Helvering* v. *Reynolds Co.* 306 U. S. 110, 114.[17]

3. *Legislative history of the statutes involved.* The legislative history of section 15 (5) of the Interstate Commerce Act and of the Packers and Stockyards Act lends support to the conclusion that

[17] It is notable also that the livestock producers, who urged the enactment of section 15 (5) of the Interstate Commerce Act, have apparently acquiesced in the construction of that section adopted in the *Atchison* case, since they have not pressed amendatory legislation or objected to the administrative division of jurisdiction between the Commission and the Secretary of Agriculture. (R. 51–52.)

in the case of direct shipments of livestock in carload lots to a public stockyard a carrier's duty is complete when the shipments are placed in suitable unloading pens.

When Congress enacted section 15 (5) it was familiar with the situation existing at Union Stock Yards in Chicago. These yards were the principal public stockyards, and the railroads, shippers, and the Yard Company were then engaged in a tripartite controversy as to where the transportation duties of the carriers terminated at Union Stock Yards. Just before the enactment of section 15 (5) this dispute ended in a decision of the Interstate Commerce Commission that rejected the contentions of the packers and shippers. See *Livestock Loading and Unloading Charges*, 52 I. C. C. 209.[18]

At the time of the enactment of section 15 (5), shippers of livestock to Union Stock Yards were subjected to two charges by the Yard Company, in addition to the line-haul railroad transportation rate; one was the yardage charge long imposed on

[18] In this case the Commission upheld the carriers in their refusal to absorb out of their line haul-rates increased charges assessed by the Yard Company for loading and unloading livestock at Union Stock Yards. This was on the ground that it was the duty of shippers rather than of the carriers to load and unload livestock and other carload traffic at these yards. The decision was reversed by the Commission on July 15, 1920, after rehearing, in *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164. This latter conclusion was ultimately sustained by this Court in *Adams v. Mills*, 286 U. S. 397.

all shipments, whether direct or otherwise, and the other was the additional unloading charge, which the Commission had held the railroads need not absorb. The amendment now embodied in section 15 (5) was designed to describe all of the terminal duties which the railroad were required to perform at public stockyards.[19] The existence of this pur-

[19] This purpose is shown by the statements of Senator Cummins, of Iowa, who introduced the bill in the Senate. For example, he stated:

"Mr. President, this proposed amendment has been brought to my attention by the American National Livestock Association * * *.

"The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a live-stock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a series of charges for various services performed in connection with the transportation of the live stock, so that the shipper does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it". [59 Cong. Rec. 674]. It is also clear from Senator Cummins' statements that he did not regard the definition of transportation duties as including the furnishing of egress. Thus he said:

"I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and *delivering it to the point at which it is to leave the car*." [*Ibid.*, italics supplied.]

pose makes particularly significant the failure of the amendment to disturb the Yard Company's long-standing yardage charges against consignees upon all livestock received, or to require the railroads to absorb these charges, when the amendment specifically required the carriers to make delivery of inbound shipments into suitable pens.

These considerations point to the conclusion that section 15 (5) is an expression of congressional intent that transportation at public stockyards should terminate with the delivery of livestock into suitable unloading pens.[20]

That Congress intended in the case of public stockyards to terminate transportation at the unloading pens is also apparent from the legislative history of the contemporary Packers and Stockyards Act (enacted August 15, 1921). In the 66th Congress a Senate bill (S. 3944) was introduced providing for a Federal Livestock Commission to regulate packers and stockyards. The House Committee on Agriculture proposed a substitute bill giving control of the stockyards to the Interstate Commerce Commission, because "that commission already has control over transportation of cattle, which does not end until they are unloaded at the yards * * *." H. Rep. No. 1297, 66th Cong., 3d Sess., p. 9. In the 67th Congress the House

[20] In this respect Congress doubtless intended to distinguish between public stockyards and private stockyards. See the last sentence of section 15 (5), Appendix, *infra*, p. 42.

Committee on Agriculture proposed a bill substantially in the form finally adopted as the present Packers and Stockyards Act. Representative Haugen, Chairman of the House Committee on Agriculture, when introducing that bill, said:

> It is proposed to give the Secretary of Agriculture jurisdiction * * * from the time the live stock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission.
>
> Up to the time of unloading the live stock the Interstate Commerce Commission has jurisdiction * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. [61 Cong. Rec. 1800.]

The definition of stockyard services in the Packers and Stockyards Act specifically includes services or facilities furnished at a stockyard in connection with the receiving, holding, or delivering of livestock.[21] Loading and unloading, on the other hand, are not included in that definition. The presence of this language confirms the view that the delivery services after "delivery into suitable pens" which are here involved should be regarded as stockyard and not transportation services.[22]

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[21] See Appendix, p. 42, *infra*.

[22] Cf. *Union Stock Yard Co. v. United States*, 308 U. S. 213, 217.

CONCLUSION

The question presented by appellant's original complaint was addressed to the administrative discretion of the Interstate Commerce Commission, and the Commission's conclusion is warranted by the facts of the present case. Alternatively, we contend that the Commission adopted a correct rule of law in acting on appellant's complaint against the carriers.

It is therefore respectfully submitted that the decree of the District Court dismissing the complaint brought in that court was correct and should be affirmed.

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FEBRUARY 1942.

APPENDIX

Interstate Commerce Act, February 4, 1887, c. 104, Part I, 24 Stat. 379, as amended:

Section 1 (3) (a) provides:

> * * * The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * * (U. S. C. title 49, sec. 1 (3) (a).)

Section 15 (5) provides:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may pre-

scribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards. (U. S. C. title 49, sec. 15 (5).)

Packers and Stockyards Act, August 15, 1921, c. 64, 42 Stat. 159:

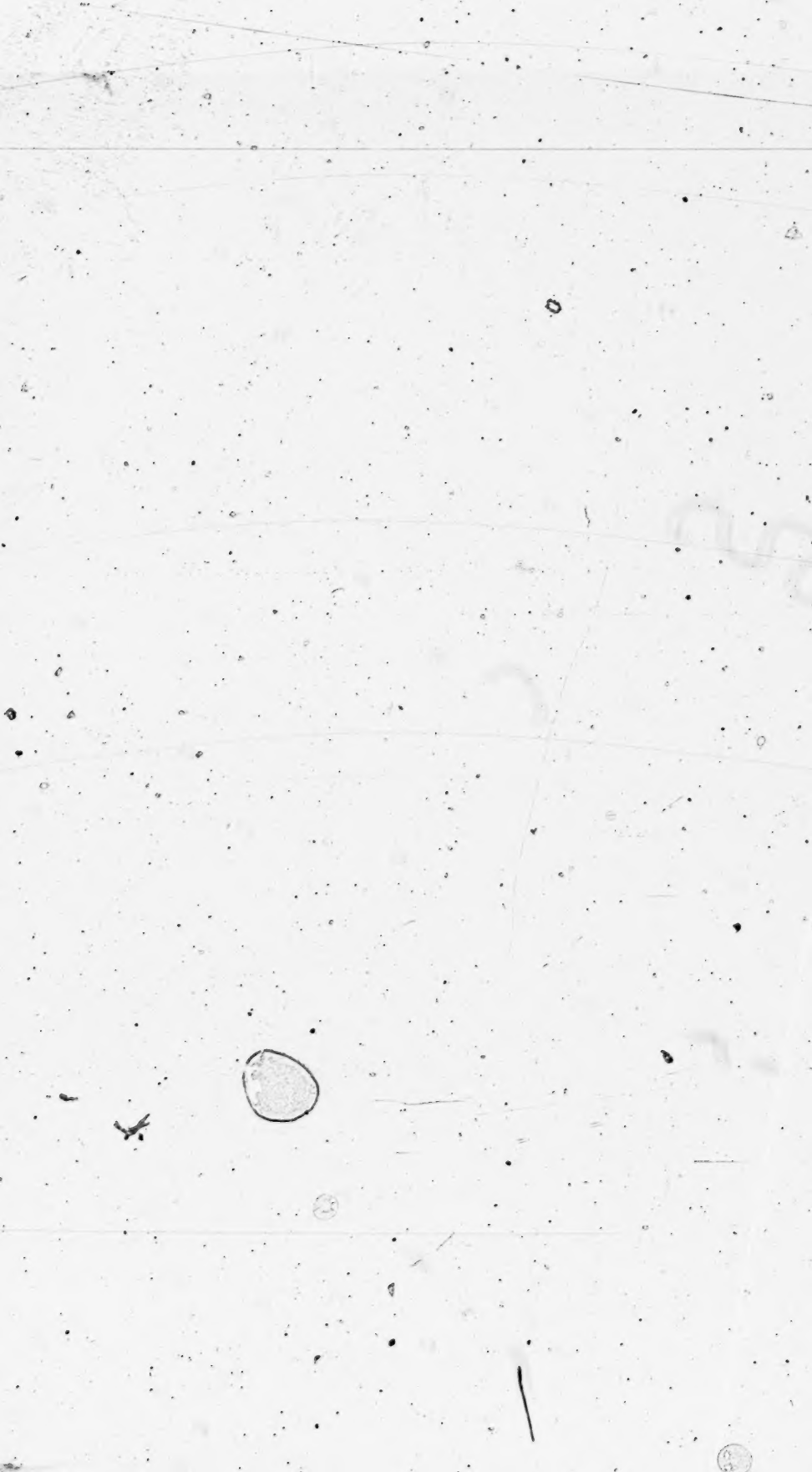
Section 301 (b) provides:

> The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of live stock; * * * (U. S. C. title 7, sec. 201.)

Section 406 provides, in part:

> Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission. (U. S. C. title 7, sec. 226.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

BRIEF OF RAILROAD INTERVENERS

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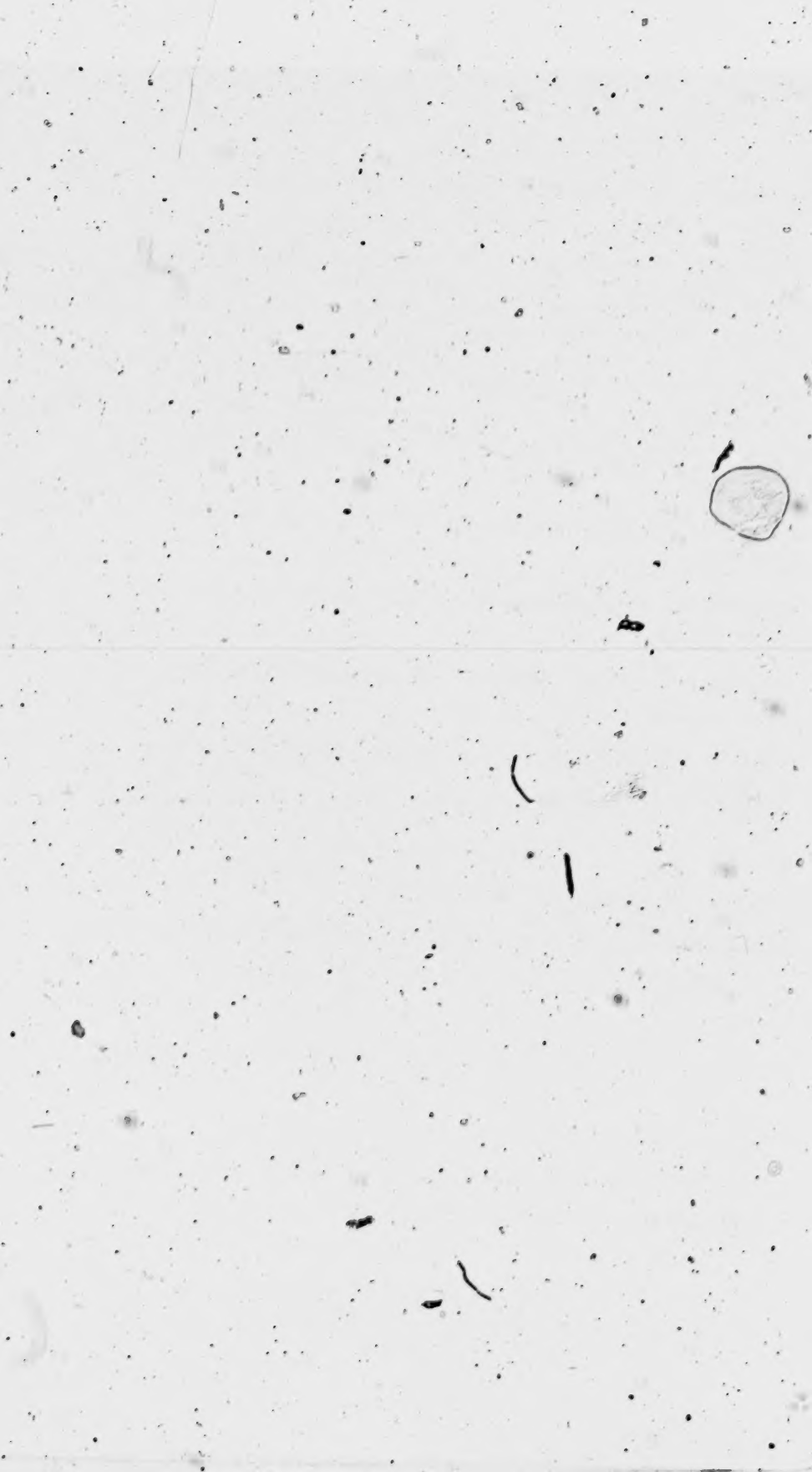
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SWIFT AND COMPANY, et al.,

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

BRIEF OF RAILROAD INTERVENERS.

THE OPINIONS BELOW.

The report of the Interstate Commerce Commission appears in the record at pages 34–57. The decision is published as No. 27862, *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179.

The findings of fact, conclusions of law, and decree of the District Court dismissing the complaint appear at pages 90–98 of the record. No opinion was filed by the District Court.

PRELIMINARY STATEMENT

These interveners, defendants in the proceeding before the Interstate Commerce Commission, are fifteen trunk line railroads serving the City of Chicago. The sole issue involves services and facilities furnished by The Union Stock Yard and

Transit Company of Chicago, but Swift did not name that company as a defendant.

The question before the Commission was whether the transportation service on livestock which a packer consigns to itself at the public stockyards in Chicago, ends with the unloading of the animals into pens in the stockyards or continues through the yards to the public streets beyond, and thus ends only when the animals have been moved out of the yards to which they are consigned.[1] To determine this question the Commission conducted a comprehensive investigation of the facts. In *Armour* v. *Alton Railroad Co.*, 312 U. S. 195 (decided February 15, 1941), which we shall call "the *Armour* case," reference is made to the hearings conducted by the Commission in this proceeding as follows:

> "The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. Co., 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1,147 pages, and numerous exhibits." (p. 202)

The record which the Court thus described was compiled in the course of five hearings. A proposed report was issued, extensive briefs were submitted, and the matter was argued to the entire Commission. The Commission found:

> "We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this

[1] For several years Swift has been receiving its livestock at its own stockyards in Chicago and not at the public yard.

respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

"We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

"The complaint will be dismissed." (R. 55)

The "alleged errors in the decision of the Commission" are stated on page 10 of appellant's brief. That statement contains no charge that the Commission's findings are not supported by the evidence; no question is raised as to the existence of "the basic prerequisites of proof."[1] The attack upon the conclusion of the Commission is that it rests upon a misconstruction of the Interstate Commerce Act, and that rightly construed, that statute compels, as a matter of law, the different conclusion sought by Swift. This was also the contention of Armour, which argued that its complaint raised a pure question of law to be determined not by the Commission, but by the courts. This Court held:

> "At what point did the common carrier's duty to transport come to an end? *Neither the statute nor any applicable principle of governing law* can be said to mark this boundary; under all circumstances and conditions and in all cases." *Armour* v. *Alton Railroad Co.*, 312 U. S. 195, 200.[2]

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[1] "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Tel. Corp.* v. *U. S.*, *307 U. S. 125, 139, 140.*

[2] All italics in quotations are added unless otherwise stated.

Paying lip service to that holding of the Court, appellant states: "it is only too well settled that the duty of a carrier as to delivery may vary, dependent upon the conditions relating to the particular traffic." (Swift's brief, p. 85) The Commission, upon an extensive investigation and a complete record, has now marked the "boundary" of the carriers' duty in respect to this "particular traffic." Nevertheless, Swift's whole argument is not an attack upon the factual basis of that finding,[1] but is an effort to show that the Commission's conclusion is forbidden by "the statute" or some "applicable principle of law." The very contention overruled in the *Armour* case was that the question was one of law which the court should determine by reading the statute. Swift, having gone to the Commission and received an adverse ruling, now repeats the contention advanced in this Court by Armour only last year, that the words of the statute leave no latitude for the exercise of an administrative judgment, that they compel the conclusion desired by Swift and forbid any other. Every provision of the statute, and every case which was relied upon by Armour to show that the issue was one of law for decision by the courts, are now relied upon by Swift as compelling a finding that, as a matter of law, transportation of this livestock does not end at the unloading pens in the yard to which it is consigned, but in the public streets surrounding the yard. This position is squarely opposed to the decision in the *Armour* case, *supra*.

Since Swift does not deny that it has had a fair hearing before the Commission, or assert that the findings of the Commission are inadequate, or that the findings made are without support in the evidence, it would be sufficient, no doubt, to show the Court that the sole contention upon which this appeal rests is that the issue here is solely one of law, exactly the contention which was overruled in the Armour case.[1] However, in the *Armour* case the Court had before it only the complaint, the

[1] See appellant's "Statement of the Case," its brief, p. 4.

allegations of which were more favorable to the packers than the facts warrant, and moreover, the complaint ignored many material facts of great importance which are opposed to the packers' contentions. For these reasons we include in this brief a review of the findings of the Commission and of the extensive evidence before it. In the interest of accuracy, we deem it proper also to include a discussion of certain subjects which are incorrectly treated in the packers' briefs, although it is believed that they relate to considerations which have little, if any, bearing upon this review of the Commission's report.

Statement of the Case

We desire to supplement appellant's statement of the case.

At all times since the beginning of its operations in 1865 The Union Stock Yard and Transit Company has assessed and collected from all shippers, including the packers, a uniform yardage charge which is assessed upon all livestock received at the yard. Evidence which came to the attention of the Commission for the first time in this proceeding shows that for many years, Swift, as a partner in the stockyard enterprise, had a large financial interest in the earnings of the Yard Company and participated in the imposition of the charge of which it now complains. (R. 45)

For the last 20 years, pursuant to the requirements of the Packers and Stockyards Act, 1921, the Yard Company has filed its schedule of yardage charges with the Secretary of Agriculture. The current tariff "U. S. Y. & T. Co. No. 11" (Ex. 67) provides:

"SCHEDULE OF CHARGES

YARDAGE CHARGES:

THE FOLLOWING YARDAGE CHARGES WILL BE MADE ON ALL LIVESTOCK RECEIVED[1] AT THESE YARDS:

Cattle	45¢ per head
Calves (400 lbs. or under)	35c per head
Hogs	15c per head
Sheep and/or goats	10c per head
Horses and Mules	50c per head"

[1] It will be noted that in express terms the tariff levies the published charges "on all livestock *received* at these yards." In the so-called *Hygrade* case (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193) which presented the same question as that involved here, namely whether transportation to the Chicago Union Stock Yards ends at the unloading chutes or at some point beyond, the Court, commenting upon the practice at this yard, said:

> "Paragraph (5) of §15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and *delivery* of livestock." (pp. 199–200)

It will be seen that the Yard Company's charge is explicitly imposed upon livestock "*received*," that this Court held that the amendment to Section 15(5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock *received*" and, in that connection, pointed to the language of the Packers and Stockyards Act which subjects "stockyards services" to the jurisdiction of the Secretary of Agriculture, and specifically defines such service to include "facilities furnished at a stockyard in connection with the *receiving*, holding and *delivery* of livestock."

In 1933, Swift and Armour made joint and identical demands upon the defendants that the practice as to the delivery of livestock at the Union Stock Yards, which had been maintained without interruption since 1865, be changed in respect to their shipments to that yard. It is admitted by Swift here (as it was by Armour in the *Armour* case) that through all the years down to the time of their joint demand in 1933, the transportation service on livestock consigned to the public stockyards, and the responsibility of the carriers therefor, ended with the unloading of the stock into the pens in the yard. (R. 45; Swift's brief, pp. 68, 69) Nevertheless, the demand of the packers in 1933 was that the long standing practice be changed and that the transportation service on livestock consigned to the yard be thereafter deemed to extend beyond the unloading pens to the public streets surrounding the yard, and thus to embrace also services and facilities furnished by the Yard Company under its tariff filed with the Secretary of Agriculture.

By these demands the packers sought to obtain preferential treatment as against the livestock producers. The direct shipments of the packers are not purchased through the competitive processes of the public market conducted at the Union Stock Yards, but at points in the country and on the farms. The Stock Yards Company has always collected a uniform yardage charge on every animal unloaded on its premises, whether the shipments were direct shipments to a packer or shipments to a commission merchant for sale. As a result of an increase in the *unloading charge* by the Yard Company, without sanction of the Commission, the producers secured the enactment of Section 15(5) to guarantee the performance of the unloading service without extra charge, but the producers have never complained against the yardage charge. In its decision herein the Commission, referring to the producers' attack upon the unloading charges in the controversy later settled in *Adams v. Mills*, 286 U. S. 397 (1932), said:

"The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted."

* * * * *

"No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge." (R. 50–52)

The packers' contention that on their own direct shipments transportation does not end with the unloading and that they should be furnished the services and facilities of the Stock Yards Company on such shipments free of the obligation to pay the yardage charge is advanced for the purpose of obtaining preferred treatment for their direct shipments at the expense of the producers whose stock is shipped to the stockyards for sale on the public market. The record shows that existing advantages to the packers in purchasing livestock on the farm, rather than competitively upon the market, is such that the increase in direct shipments has been tremendous. (R. 53)

Following their joint demands, Swift filed a complaint with the Commission alleging that the Yard Company's imposition of a yardage charge upon its shipments constitutes an "unreasonable practice" by the defendant trunk line carriers in violation of Section 1 of the Interstate Commerce Act. (R. 24, 32). Armour filed a petition of intervention in the proceeding before the Commission alleging that it had instituted a suit in court against the trunk lines on the same cause of action. (R. 36, 124)

Armour's case was dismissed by the Federal District Court (27 F. Supp. 625) which held that "this case seems to me to come squarely within the rule laid down" (p. 629) by the Supreme Court speaking through Mr. Justice Brandeis in

Great Northern Railway Company, et al v. *Merchants Elevator Co.*, 259 U. S. 285 in which this Court said "resort to the Commission is required" when "the inquiry is essentially one of fact and of discretion in technical matters." The Circuit Court of Appeals reached the same conclusion (111 F. (2) 913), and, as stated above, this Court affirmed February 3, 1941. *Armour and Co.* v. *Alton R. R., et al.*, 312 U. S. 195.

Notwithstanding the fact (as the Commission has found, R. 37) that the complaint is directed at a "yardage charge . . . assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture," neither Swift nor Armour has ever made any effort to secure an adjustment of those charges from the Secretary of Agriculture. Not only have they refrained from making any direct attack on the Yard Company's charges, but they refrained also from making the Yard Company a defendant in this proceeding, regardless of the fact that the services in question must be performed by the Yard Company and upon the property of the Yard Company, over which, of course, the trunk line carriers have no control.

The unwillingness of the packers to join issue with the Yard Company respecting a charge paid to the Yard Company for services performed by the Yard Company is made more marked by Swift's admission that it is not paying, and has never paid the trunk lines for the services in question. The appellant states:

> "The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness to pay whatever the Commission might consider reasonable for egress, in addition to the line-haul rate to the unloading pens . . ." (Swift's brief, p. 3)

Swift's change in position, to which it here refers, occurred during the hearings before the Commission, after it was proved

beyond question, as the Commission has now found, that the transportation rates which the Commission had itself prescribed on livestock consigned to the public stockyards at Chicago were not intended to, and do not, compensate the carriers for any services or facilities beyond the unloading pens. The rates were so made by the Commission because the carriers had never furnished any service beyond the unloading and it had always been recognized by everyone that the transportation services ended with the unloading. The Commission found:

> "The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services." (R. 45)

Swift now concedes that it is receiving from the carriers all of the services for which it is paying the carriers, and recognizes that it must pay a charge in addition to the transportation rate for the service here in question, as in fact it has done on its every shipment to the yard since 1865. For 20 years the reasonableness of the charge for that service has been subject to Federal regulation through the jurisdiction of the Secretary of Agriculture.[1] Neither Swift nor Armour has ever invoked that jurisdiction. Why, it may be asked, has each of these packers now carried a case against the trunk lines to this Court in an effort to avoid any issue with the Yard Company whose charge it assails? The answer is to be found in the history of this yardage charge.

One of the incidents of the historic relationship between the packers and the Yard Company was an agreement by Swift,

[1] The Secretary has repeatedly exercised this jurisdiction and, as the Commission has found, this Court has sustained him in so doing. (R. 53–54) We discuss this *infra* pp. 88 to 92.

Armour, and the other Chicago packers with the Union Stock Yard and Transit Company "that as long as the Yard Company conducted its business at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their livestock." (R. 43; Ex. 47, pp. 13, 14). Notwithstanding that agreement, Swift, for some years, has been receiving its direct shipments not at the yard of the Union Stock Yard and Transit Co., but at its own yard in Chicago. Under these circumstances Swift has not found it expedient to make any direct attack upon the Yard Company's charge. As to Armour, it is a matter of common knowledge that that company and the Yard Company are under the common control of Mr. Frederick H. Prince.[1]

It has been pointed out that the Yard Company's historic charge, published in tariff form since 1921, is a uniform charge applying on all livestock *received*. Swift states that it does not desire all of the services and facilities which are available to it upon payment of that charge, and strongly implies, although it nowhere specifically states, that the uniform yardage charge imposed by the Yard Company is too high for application to the services desired by it.[2] The situation therefore is this: conceding that it must pay someone for the additional services which it requires, and that it is not paying for these

---

[1] The Commission, finding that the transportation service ends with the unloading of the stock, and that the assailed practice is reasonable and lawful, deemed it unnecessary to pass upon the trunk lines' contention that the Yard Company was an indispensable party to this proceeding.

[2] It is clear from their whole attitude in these proceedings, that neither Swift nor Armour would suggest that the Yard Company's total receipts from the uniform yardage charge are excessive. Their theory, presumably, is that the yardage charge should not be of a uniform or blanket character, that the charge for services performed on their own shipments should be less than the amount now assessed and, if necessary, that the charge on the producers' stock should be increased.

services in the transportation rate assessed by the carriers, Swift, while implying that its payment to the Yard Company is excessive, has never sought to force the Yard Company to reduce it by invoking the processes of the Packers and Stockyards Act, now in existence for more than twenty years. We believe, as stated above, that the explanation for this strange conduct must be found in the history of the yardage charge and the relations between the packers and the Yard Company in respect thereto.

Before proceeding to the argument, we direct attention to certain additional findings of the Commission as follows:

> "Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers." (R. 42)

* * * * *

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads." (R. 45)

* * * * *

"For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their own covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago." (R. 46)

On Swift's complaint praying that the order of the Commission be set aside and annulled, the District Court, after due hearing, found:

"1. The findings made by the Commission are adequate to support its conclusion that the transportation of direct shipments of livestock to the Union Stock Yards at Chicago is completed when the livestock is placed in the unloading pens, and that yardage charges assessed by the Stock Yards Company for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, is not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of livestock transported to the Union Stock Yards did not result in an unreasonable practice.

"2. The Commission had evidence before it sufficient to sustain its findings." (R. 96–97)

Pursuant to these conclusions of law the court entered its decree dismissing the complaint. (R. 97–98)

PROPOSITIONS RELIED UPON BY THE RAILROAD INTERVENERS

The railroad interveners rely upon two primary propositions as follows:

(1) **"Neither the statute nor any applicable principle of governing law"[1] is determinative of the question raised by the complaint because that question is one of an administrative nature requiring determination by the Interstate Commerce Commission, and the appellant has had a**

[1] The language of the Court in the *Armour* case, p. 3, *supra*.

full and fair hearing before the Commission on that question.

(2) The evidence supports the finding of the Commission upon the administrative issue before it, that "the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards." (R. 55)

To bring to the attention of the Court at the outset the "circumstances and conditions"[1] which the Commission found decisive here, we discuss in reverse order the two propositions just stated. A complete reference to the record before the Commission and the Commission's findings thereon will be necessary in the course of the argument which follows, and to avoid duplication a more detailed statement of the evidence and findings is not made here.

SUMMARY OF ARGUMENT

The evidence supports the finding of the Commission that "the transportation of livestock consigned to complainant at the Union Stock Yards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards," (R. 55) and that the practice complained of is not unreasonable.

The yardage charge of the Yard Company is assessed only on shipments consigned to the Union Stock Yards. Swift is not consigning its shipments to those yards, and is not paying the yardage charge of which it complains. It, like the other packers at Chicago, has the choice of a number of alternatives in determining where it will receive its shipments at Chicago.

The Yard Company's charge on direct shipments which is the subject of the attack is one which it has assessed since its origin in 1865, and which the packers paid without protest until

[1] The language of the Court in the *Armour* case, p. 3, *supra*.

1933. In 1891 the packers at Chicago, both large and small, insisted that the yardage charge on their direct shipments was a subject for negotiation and bargaining with the Yard Company, and one with which the railroads had no concern. Swift, Armour and their associates built their own stockyards, the Central Stock Yards, to receive their direct shipments, and the railroads were ready and willing to deliver the direct shipments to that stockyards. The packers, however, gave up the Central Stock Yards when the Yard Company agreed to allow them an interest in its business, participation in the assessment of its yardage charges and a share in the proceeds. Swift and Armour made the practice their own, and "agreed that as long as the Yard Company conducted its business at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock." (R. 43)

The evidence shows and the Commission found that the transportation rates which the Commission itself prescribed do not compensate the carriers for any service performed after the placement of the animals in the unloading pens. The carriers have no control over such services or of any facilities in the yards beyond those pens.

After the passage in 1906 of Section 1 (3) of the Interstate Commerce Act in its present form, the packers not only made no protest against the assessment of the yardage charge on their direct shipments but sought a renewal of the arrangement by which they would continue to participate with the Yard Company in the assessment and proceeds of the charge.

The Supreme Court in 1912 ordered the Yard Company to file with the Commission its charges for transportation services. Pursuant to the order, the Company filed a tariff which did not contain the yardage charge. Instead of protesting this, the packers continued to pay the charge on direct shipments as a charge for stockyards services, and to seek another bargain with the Yard Company for a share in the proceeds of the charge.

Swift was a party to the Commission's investigation of the transportation activities of the Yard Company after the Company cancelled its I. C. C. tariff in 1917, but made no suggestion that the yardage charge which it was paying on direct shipments was a transportation charge, either during the investigation or after the Yard Company had re-filed its tariff. 52 I.C.C. 209; 58 I.C.C. 164.

After the enactment of Section 15(5) in 1920, the Yard Company continued, as before, to collect its yardage charge on all direct shipments, with no claim from the packers, who continued to pay the charge, that the section could be construed as forbidding its collection. Swift expressly concedes in this proceeding that there is no support for its complaint in Section 15(5). The legislative history of that section demonstrates that Congress recognized the understanding of all parties that the obligations of the railroads do not extend beyond the unloading pens.

In 1921 the Packers and Stockyards Act was passed. Consistently with the Act's definition of stockyards services as including "receiving" of livestock, the Yard Company filed with the Secretary of Agriculture a tariff of charges for stockyards services, which included the yardage charge on direct shipments. There was no protest against the inclusion of this charge in the Yard's tariff covering stockyards services, just as there had been no protest against its exclusion from the tariff covering the Yard's transportation services. Nobody suggested that the Yard Company had misinterpreted the Act, and since 1921 the packers have paid the yardage charge in accordance with that tariff.

In the following years, Swift and Armour not only paid the charge without protest, but caused many other stockyards companies, which they controlled, to assess such charges on all direct shipments. In 1927 they argued to the Commission

that such charges were valid and proper under the statutes, and they were upheld by the Commission.

Not until 1933 did Swift and Armour change their interpretation of the statutes and claim that the long standing practice was unlawful under a section of the Interstate Commerce Act which was enacted in 1906. Four more years elapsed before proceedings were instituted on that demand, and then Armour tried to avoid the jurisdiction of the Commission by its suit in the courts.

The Secretary of Agriculture has asserted jurisdiction over these yardage charges on direct shipments under the Packers and Stockyards Act, 1921. If the charges are unreasonable the packers have a complete remedy by complaint to the Secretary under that Act.

In three cases this Court has held that the question whether a particular service at the Chicago Union Stock Yards was a transportation duty of the carriers is not a pure question of law but is an administrative matter for the decision of the Interstate Commerce Commission, involving such factors as the usage and custom, the history of the service, the physical conditions and the participation of the parties in establishing the practice. *Adams* v. *Mills*, 286 U.S. 397; *Atchison, T. & S. F. Ry.* v. *United States*, 295 U.S. 193; *Armour & Co.* v. *United States*, 312 U.S. 195. Upon a record so convincing that the packers do not attack it as lacking the necessary prerequisites of proof, the Commission has determined that the practice is one which the packers have made their own and that it is not an unreasonable practice. We submit that the packers' argument that the Commission, as a matter of law, had no right under the statute to reach that decision is unsound and has already been rejected by this Court.

ARGUMENT

Foreword

In its decision in the *Armour* case the Court said:

> "The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. R., 238 I. C. C. 179 . . . "
>
> "The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application. The decision below is accordingly affirmed." (312 U.S. at p. 202)

The Commission has now decided the question which the Court held to be for the determination of "that expert body." Although the adequacy of the evidence to support the Commission's findings is not controverted, the Court will desire to satisfy itself that "the basic prerequisites of proof"[1] have been met. Before discussing the evidence, however, we wish to comment briefly upon the attitude of Swift, the appellant, and Armour, intervener, toward the decision of the Court in the *Armour* case, as displayed in their briefs herein.

The Commission, passing upon the question which this Court held that the Commission must decide, found that the transportation service ends with the unloading and, *therefore*, that the services and facilities furnished by the Yard Company within the yard after the completion of the unloading are, of necessity, outside its jurisdiction. Plainly, this was an inescapable corollary of the Commission's determination of the administrative question before it. To hold that transportation ends with the unloading and, consequently, that services beyond that point are outside the Commission's jurisdiction, are but opposite sides of the same coin. Swift's effort to distort the meaning and significance of the decision of the *Armour* case and that of the Commission in this case has taken an extraordinary form. We quote without further comment from appellant's brief (p. 25) as follows:

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[1] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 140.

> "The Commission finds that it has no jurisdiction of the charges here involved for the access 'which must be purchased' (p. 197 of Commission's decision, R. p. 55). To the contrary this court in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, holds that the Commission is the only tribunal which has jurisdiction * * *" (p. 25, see also to same effect pp. 18, 84–90)

The brief of Armour as intervener herein, assumes throughout, for the purpose of the argument, that the Commission's "every finding of fact made is supported by substantial evidence; that the evidence requires no findings which were not made, and that each finding of the Commission has been found by this Court to be true, correct and adequately supported by the evidence." (Armour's brief, January 27, 1942, pp. 1, 2) Proceeding on that assumption, Armour's whole argument, like Swift's, is an effort to impeach the decision of this Court in the *Armour* case. Both argue that the statute and applicable principles of governing law mark the boundary of the transportation service, whereas this Court held that "neither the statute nor any applicable principle of governing law can be said to mark this boundary." *Armour & Co.* v. *Alton R.R.*, 312 U. S. 195, 200. Counsel for Armour have accomplished the feat of arguing this question throughout the 47 pages of its brief without so much as a single reference to the decision of this Court one year ago in its own case which it now seeks to overturn. It is difficult to say whether Swift's or Armour's method of dealing with the Court's decision in that case is the more astonishing.

I.

THE EVIDENCE SUPPORTS THE FINDING OF THE COMMISSION THAT "THE TRANSPORTATION OF LIVESTOCK CONSIGNED TO COMPLAINANT AT THE UNION STOCK YARDS IN CHICAGO, ILL., ENDS WHEN THE LIVESTOCK HAS BEEN UNLOADED INTO THE UNLOADING PENS AT THE UNION STOCK YARDS." (R. 55)

The searching investigation conducted by the Commission in this proceeding developed a great volume of factual data which was never before the Commission previously, either in the so-called *Hygrade* case[1] or in any other proceeding. These facts showed, among other things, the actual use being made of the facilities available for the receipt of livestock in Chicago, other than those at the Union Stock Yards, and the adequacy of these facilities including the public delivery tracks used by the small packers and the use by Swift of its own receiving yard; they showed in great detail the vital facts which make up the history of the yardage charge at the public yard, and the relations between the Yard Company, Swift, and Armour in respect to that charge.

A. SWIFT HAS THE CHOICE OF A NUMBER OF ALTERNATIVES IN DETERMINING WHERE IT WILL RECEIVE THE LIVESTOCK CONSIGNED TO IT AT CHICAGO.

Those shipping livestock to Chicago have the choice of consigning it to the Union Stock Yards and having the unloading service performed without extra charge,[2] but subject to the

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[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935).

[2] Section 15(5) of the Interstate Commerce Act, Part I, provides in part as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include * * delivery at public stockyards of inbound shipments into suitable pens, * *."

Yard Company's yardage charge, or of taking delivery at other points in the Chicago area and unloading the cars themselves, free from the imposition of any yardage charge. These choices as shown by the evidence are as follows:

1. The team tracks of all of the trunk lines are available for the delivery of livestock and are constantly used for that purpose. Hundreds of cars of stock, consigned principally to the small packers, are annually received and unloaded there. (Ex. 21) The animals pass from the car directly into trucks. The consignees themselves unload the cars consigned to these tracks, just as consignees ordinarily unload other kinds of freight, but delivery is made on the premises of the railroads, and no yardage or other charges are assessed in addition to the line-haul rate. (R. 422–427, 490–491)

Swift criticizes the team track facilities on the ground that they do not include pens. In actual practice the facilities have proved to be fully adequate for the use made of them by those desiring to avoid payment of the Yard Company's yardage charges, who do not have a private stockyard, as does Swift. Livestock is not driven through the streets of the City of Chicago on the hoof. The animals must therefore be removed in trucks. Swift insists that it requires no storage or holding of its livestock but desires immediate removal, so that its criticism of the team track facilities which permit the driving of the animals directly into the trucks, in which they are to be removed (R. 473), was shown to be without merit. The Commission's holding is that the team track facilities "have been found ample." (R. 46)

2. Swift has the choice also, under the tariffs of the trunk lines, of driving its direct shipments into the very doors of its packing plant by ordering delivery on the industry tracks which serve the plant, and paying the applicable switching charges which the Commission has found reasonable for that service.[1] (R. 46, 422–423)

[1] *Hygrade Food Products Corporation* v. *Santa Fe*, 195 I. C. C. 553 (1933).

3. Swift maintains its own private stockyards in the City of Chicago and for the last several years it has received its direct shipments at that yard located upon its own property. Swift pays the flat Chicago rate on its shipments to this yard regardless of where they originate or what line brings them to Chicago, (R. 425) and performs the unloading service at its own expense, its yard not being a public stockyard. The appellant is thus seeking to support its attack on the yardage charge by calling the Union Stock Yards the defendants' livestock terminal at Chicago, although Swift is itself receiving all of its direct shipments at its own yard and is not paying that yardage charge.

4. Finally, Swift may, if it chooses, consign its shipments for unloading at the public yard, upon the premises of the Yard Company. But as shown above, and as the Commission has found, (R. 46) Swift consigns its shipments to the public yard only when it chooses to do so in preference to delivery at some other point in Chicago, just as a shipper may, if he elects to do so, and upon similar conditions, consign certain classes of freight for delivery at a public warehouse rather than upon his own premises, or upon the public team tracks. On shipments consigned to this yard "delivery * * *into suitable pens*"[1] by long custom, and since 1920 by statute,[2] is required to be performed by the carriers without extra charge. On the other hand, such livestock is deliberately consigned for delivery at a public livestock market located on the premises of the company operating the public stockyards, and that company throughout its entire history has assessed a yardage charge on all livestock so received.

5. We direct attention to one further alternative which the packers voluntarily relinquished. Almost fifty years ago, at a time when Swift and the other packers had for many years been receiving their direct shipments at the Union Stock Yards, and

[1] Section 15(5).
[2] Id.

paying thereon to the Yard Company its regular yardage charge, the packers constructed a stockyard of their own, adjacent to their plants, for the purpose of avoiding the payment of the yardage charges. The trunk line carriers were ready and willing to make delivery to the packers' stockyards and sought to do so. Nevertheless, complainant and the other packers, in exchange for substantial payments from the Yard Company and an interest in its business, abandoned their own yards, agreed with the Yard Company never to be concerned in any yard for the receipt of stock at Chicago other than the yards of The Union Stock Yard and Transit Company, and voluntarily continued the practice of receiving their stock at those yards and paying the charges of the Yard Company until Swift, despite that agreement, began to take delivery of its direct shipments at its own yard. The full significance of the facts in respect to the establishment and abandonment by the packers of their own yards is discussed elsewhere in this brief.

The evidence, we submit, fully supports the finding of the Commission, as follows:

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than

one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there." (R. 46)

B. THE CUSTOMARY AND REASONABLE SERVICE WHICH THE SHIPPERS ARE ENTITLED TO RECEIVE FROM THE CARRIERS IN RESPECT TO THIS TRAFFIC HAS BEEN ESTABLISHED BY THE ACTS OF THE PARTIES CONCERNED OVER A LONG PERIOD OF YEARS.

In the latter part of this brief we shall show that in a series of cases, of which the latest is the *Armour* case, this Court has established the rule that the precise limits of the transportation service on livestock consigned to the public yard at Chicago are those which are customary and reasonable, as determined by the Commission.[1]

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[1] In *Adams* v. *Mills*, 286 U. S. 397 (1932), this Court ruled that the question whether the unloading service performed by the Stock Yards Company at the Chicago Union Stock Yards was a part of the transportation service, was a question for the Commission and not for the courts. The question presented by the Swift complaint, and by Armour in its court case, is identical in character with the issue in *Adams* v. *Mills*. There had been preliminary resort to the Commission in that case and the Commission had decided that the unloading was a part of the transportation service and that it was covered by the line-haul rate.

In affirming the decision for the plaintiffs in *Adams* v. *Mills*, the Court, through Mr. Justice Brandeis, said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained." (pp. 409–410)

facts brought to light by an investigation of the Federal Trade Commission which came to the attention of the Commission for the first time in its investigation in this proceeding, permitted the Commission to learn in this case how decisively and how deliberately the custom and practice now assailed was established by the will and purpose of all of the parties in interest.

Throughout a period of approximately 70 years prior to the complainant's recent efforts to change the practice, the packers, the Yard Company, and the railroads, were in agreement that railroad transportation ended with the service of unloading at the Union Stock Yards, and for a substantial part of that period complainant itself participated in the imposition of the yardage charge which it now assails, as a partner of the Yard Company in the stockyard enterprise.

We shall now review the evidence which shows the participation of each of the parties, (a) Swift and the other packers, (b) the Yard Company, and (c) the line-haul carriers, in the usage and custom which, as the Commission has found, operate to end the transportation service at the Union Stock Yards with the unloading of the stock.

C. THE LONG ESTABLISHED CUSTOM AND USAGE OF ENDING TRANSPORTATION OF DIRECT SHIPMENTS WITH THE UNLOADING THEREOF, HAS BEEN ACCEPTED AND PARTICIPATED IN BY SWIFT AND THE OTHER PACKERS, BOTH AS SHIPPERS, AND IN THE CAPACITY OF PARTNERS IN THE STOCKYARDS ENTERPRISE.

With the very beginning of the Yard's operations in 1865 a clear distinction was made between the services which the shippers were entitled to receive for the transportation charges paid the carriers, and the stockyards services received from the operator of the stockyards. Through an arrangement between the trunk line carriers and the Yard Company the latter was compensated out of the through rates for its common carrier service of unloading the cars. The shipper made no extra payment for that service and had no separate arrangement with

the Yard Company with respect to it. On the other hand, from the very beginning, all shippers, including the packers, were required by the Yard Company to pay it a uniform yardage charge on all cattle "received" at the yard, *whether they were consigned to packers and immediately driven out of the yard for slaughter, or whether they were consigned to commission firms for sale in the yards.*[1] (R. 523, 580) The measure of these yardage charges was determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and in respect both to the measure and the payment of the charge, and the performance of the services, the shippers dealt solely with the Yard Company which collected and retained for itself the entire yardage charge. (R. 523) A practical line of demarcation was thus drawn between the services paid for by the transportation rate, and those paid for as stockyards services, which was brought home to the shipper in every transaction in a way that made it impossible for him to misunderstand. This practice had been firmly established for approximately 25 years when, about 1890, complainant and the other packers, by virtue of transactions now to be discussed, became, in effect, partners of the Yard Company in respect to the performance of the yardage services, the assessment of the charge therefor and participation in the earnings accruing from those services.

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[1] Swift seeks to make some point of the fact that it does not now call upon the Yard Company for a weighing service for the yardage charge which it pays on its direct shipments. (Brief, p. 67). But neither did it do so during all the years when it was bargaining with the Yard Company over the yardage charge and actually participating in the assessment of the charge as a partner in the Yard Company's business. From the beginning of its operations, and for over fifty years the Yard Company did not weigh the packers' direct shipments. (Ex. 61, pp. 221–223). In recent years some of the shipments have been weighed and some have not. (R. 553–556).

D. IN 1892 THE PACKERS ACQUIRED AN INTEREST IN THE YARD COMPANY AND PARTICIPATED WITH IT IN THE IMPOSITION OF A YARDAGE CHARGE ON DIRECT SHIPMENTS AND IN THE EARNINGS ACCRUING FROM THE YARDAGE SERVICE. IN RETURN, THE PACKERS ABANDONED THEIR OWN TERMINAL FACILITIES, AND AGREED NEVER TO RECEIVE LIVESTOCK AT ANY POINT IN CHICAGO OTHER THAN THE UNION STOCK YARDS:

After the packers had paid the Yard Company substantial amounts for yardage on their direct shipments for a period of some 25 years, Armour and Swift decided about 1890 that their patronage in respect to these yardage services was something that they should sell rather than give to the Yard Company. Accordingly, they formed a purpose to make use of this patronage, and the power it gave them, to demand and to acquire a proprietary interest in the Yard Company. To effectuate this design, Armour and Swift threatened to receive their shipments at points other than at the Yard Company's yard. To make this threat real they constructed their own receiving yard called the Central Stock Yards, located on the tracks of the Yard Company, adjacent to the public yards. The packers then brought suit in the State courts of Illinois against the Yard Company to require it to permit the trunk lines to make delivery at the packers' new receiving yard over the tracks of the Yard Company, and thus deprive the Yard Company of its yardage charge. In that proceeding the packers established the fact that the trunk lines stood ready to make delivery to the new receiving yard, and had attempted to do so but had been physically stopped by the Yard Company. The steps thus taken by Armour and Swift proved effective: the Yard Company capitulated, a deal was made, the packers dismissed their case in the courts, deeded over their own newly constructed receiving yard to the Yard Company, made certain guaranties with respect to the income to be received by the Yard Company from its yardage charges, and finally agreed never to receive their livestock in Chicago at a point other than the Union Stock Yards. In return they secured a proprietary interest in the Yard Company and a voice in its management, and, as the Commission found, the Yard's facilities became their own facilities for the receipt of livestock in Chicago. (R. 41-46)

The following is quoted from the Report of the Federal Trade Commission on the Meat Packing Industry (Ex. 59):

"SECTION 6.—The Formation of the New Jersey Company.

"In 1890 a holding company, known as the Chicago Junction Railways & Union Stock Yards Co., was organized under the laws of New Jersey for the purpose of acquiring the stock ownership of the Union Stock Yard & Transit Co. of Chicago, Ill. The history of the formation of the New Jersey company, based upon data obtained from the records of that company, can be summarized as follows:" (p. 198)

* * * * * *

"SECTION 7.—Demands of Armour, Swift, and Morris for a Share in the Earnings of the Company.

"In the course of his examination by the Commission's representative, F. H. Prince also made statements tending to show that the New Jersey company owes its existence partly to the inability of Nathaniel Thayer as president of the Yards company to satisfy the demands of the three big packers, Armour, Swift, and Morris, *for a share in the earnings of the company and a voice in its management.* In view of the fact that in the first meetings of the board of directors of the New Jersey company plans were considered whereby the packers would become managerial and profit-sharing factors in the stockyards of Chicago, credence may be given to the assertion that the three big packers had made concerted demands of this nature before the holding company was formed. Furthermore, a review of the wide range of schemes thus considered shows that none of them would have been possible of consummation by the Yards company operating under the restricted charter granted by the State of Illinois in 1865." (p. 199)

* * * * * *

"From the information contained in the course of this study it appears: * * *

"That Prince and Armour were enabled successfully to gain advantages at the expense of the stockholders of

the New Jersey company because of favorable conditions created by demands for a share in the earnings of the stockyards of Chicago which were made upon the New Jersey company *after 1906* by the three big packers, Armour, Swift, and Morris. *Demands of a similar character had been advanced and only temporarily satisfied in* 1891." (p. 192)

If, as indicated, the New Jersey Company was created to deal with the packers it lost no time in doing so, because the latter accomplished their purpose to obtain an interest in the business of the Yard Company, and to share in the earnings accruing from the yardage services, by an agreement in writing dated January 15, 1892. The parties to this agreement are Chicago Junction Railways and Union Stock Yards Company (the so-called New Jersey Company, owner of the Union Stock Yard & Transit Company) as party of the first part, and, the Swifts on behalf of Swift & Company, the Armours as co-partners composing the firm of Armour and Company, and others of the big packer group, as parties of the second part. (Ex. 47) A little later, on June 23, 1892, a similar contract was made between the New Jersey Company and the so-called small packer group. (Ex. 48)

Prior to the execution of these contracts the packers had taken three major steps with the object either of avoiding the payment of yardage charges on direct shipments, or of obtaining an interest in the business which was imposing them.

The first of these steps was to acquire several thousand acres of land at a point in Indiana about 10 miles from Chicago which, the packers declared, could be used as a new site for their plants.

The other two moves of the packers have a more vital relationship to the issue in this proceeding. One of these is described in the contract of 1892 as follows:

"[The packers] have purchased and acquired certain premises at Packingtown aforesaid, known as the 'Central Stock Yards' near the yards of the said Transit Company,

and have constructed and erected on said premises various platforms, pens, sheds, railway sidings, etc., *for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them or either of them, and thereby avoiding the payment of any yardage charges to the said Transit Company*, and have demanded that the said Transit Company permit the use of their railway tracks for the transportation and delivery of such cattle and live stock to their said Central Stock Yards." (Ex. 47, pp. 4 and 5)

To force the Yard Company whose rails served the newly constructed Central Stock Yards the packers then took action in court which is described in the contract of 1892 as follows:

"Armour & Company, Swift and Company and Nelson Morris & Company have recently commenced three several suits in equity in the Circuit Court of Cook County, State of Illinois, against the said Transit Company, claiming and demanding as relief that the said Court by order and decree compel the said Transit Company to afford facilities over its railways for the transportation and delivery of any and all cattle and live stock belonging or consigned to them or any of them, or to said Central Stock Yards without the payment of the usual yardage charges thereon as heretofore paid by them and collected by said Transit Company." (Ex. 47, p. 5)

It will be observed that the sole purpose of the Central Stock Yards acquired by the packers was avowedly to provide a place where they could take delivery of their direct shipments, not in accordance with the long established custom and usage at the yards, by the employment of the Yard Company as their agent for that purpose, but on their own premises, and without the payment to the Yard Company of its yardage charges. Having acquired this yard contiguous to their killing plants, and located between the main tracks of the Yard Company, the packers brought suits in the State courts of Illinois naming the Union Stock Yard & Transit Company as the only defendant. The

purpose of the suits was to require the Yard Company to permit the line-haul carriers to use the tracks of the Yard Company in making deliveries to the packers' yards, the so-called Central Stock Yards. The several bills of complaint (Exs. 49, 50, 51) allege that the Yard Company is a common carrier; that the packers have constructed their stockyards upon its tracks, and have connected their yards by viaducts with their killing plants, and that the Central Stock Yards thus constructed and located was more conveniently and economically located for the packers than the Union Stock Yards. The complaint in the suit brought by Swift alleges:

> "'The Central Stock Yards, located at the corner of Justine and 43rd Streets,' and the same are designed for the sole and exclusive use of the owners thereof, to wit: your orator, Armour & Co. and Nelson Morris & Co. *for the receipt of their own cattle bought by them at points outside of Chicago and transported to said premises for the purpose of being slaughtered at their said slaughtering and packing establishments.*" (Ex. 49, pp. 20a, 21a.)

The bill alleges that the trunk line railroads had attempted to make delivery of their livestock at the Central Stock Yards over the tracks of the defendant yards, but had been prevented by the Yard Company from doing so. The bill alleges further that:

> "the said Union Stock Yard and Transit Company, * * * also claims the right to make and compel the payment of so-called yardage charges for all live stock so owned by or consigned to your orator for delivery upon its said premises, of 25 cents per head for cattle, 6 cents per head for sheep, 8 cents per head for hogs and 15 cents per head for calves, which said charge is made as a charge *in favor of said Union Stock Yard and Transit Company and in addition to the freights charged for the transportation of said live stock.*" (Ex. 49, pp. 25a, 26a.)

The allegations of Swift's bill were sworn to by G. F. Swift. In support thereof Swift and the other packers presented to the

court affidavits of the officers of the trunk line railroads showing that the latter were ready and willing to make delivery to Swift at its plant facility, the so-called Central Stock Yards, and that they had attempted to make such deliveries and were prevented from doing so by the Yard Company. (Exs. 53, 54, 55) By other affidavits the complainants established the adequacy of their plant facility, the Central Stock Yards, to handle the direct shipments which it was intended to receive. (Exs. 65, 66)

Swift and the other packers were formally advised by the sworn answer of the Yard Company in the suits instituted by the packers, that the Company claimed the right

> "to require the payment of a yardage charge for all livestock received and unloaded at its said stock yards" and
>
> "by Section 2 of its charter * * * was expressly authorized to make and require to be paid such reasonable charges as might be deemed just and proper for the care, subsistence and handling of livestock received and unloaded at its said yards * * * and that in the exercise of its power conferred by said charter it claims the right to charge for all live stock delivered in its said yards reasonable yardage charges." (Ex. 52, p. 32)

The action taken by the packers in erecting their own stockyard facilities and in bringing the suits against the Yard Company related specifically to the payment to the Yard Company of yardage charges on direct shipments. Their purpose was to avoid further payments of that charge unless they could acquire an interest in the Yard Company, and participate as a proprietor in the imposition of the charge and the proceeds thereof. It is highly significant that they made no demand upon either the Yard Company or the line-haul carriers that they be permitted to consign their directs to the public yards and then remove them without paying a yardage charge. Instead, they recognized that the only way to avoid the yardage charge was to take delivery of the directs at some point other than the public yards. From the outset the packers recognized that the trunk

lines had no interest in the yardage charges, and at no time suggested that they had already paid for the yardage service as a part of transportation, or that the railroads could or should participate in any adjustment of the charge or any change in the established practice.

The situation created by the demand of the packers for an interest in the assessment of the yardage charges by the Yard Company, and the steps taken by them to force its acceptance, was temporarily composed by the agreements of 1892. A tentative arrangement contemplated that the packers would become part owners of the New Jersey Company by taking a large block of stock, and being represented on its board by P. D. Armour.[1] (Ex. 59, p. 202) It developed, however, that the concessions so proposed to be granted to the packers were more liberal than the New Jersey Company could carry out and, as will be shown, in the contract executed, income bonds were substituted for the stock issue.

The contract as drawn (Ex. 47) after reciting that: "the principal revenue and income of said Transit Company are derived from yardage charges on cattle and live stock and from the sale of feed" (p. 3), outlines the three steps taken by the packers to avoid the payment of yardage charges on their direct shipments, *i.e.*, (1) the purchase of the site ten miles from Chicago, (2) the construction of the Central Stock Yards adjacent to their plants and (3) the suits against the yards to compel delivery at those yards. By the covenants which follow the packers agree:

First. To convey their Central Stock Yards to the New Jersey Company. (p. 8)

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[1] It appears that Swift's General Counsel was a director of the Union Stock Yards Company in 1894. When he took office as such, how long he continued in that capacity, and how many other representatives of the packers were on the Board, if any, does not appear. (Ex. 59, p. 314; Ex. 70, p. 9.)

Second. That having consented to compromise their claims and demands against the said Transit Company as set forth and alleged in said three suits (p. 7):

> "* * * they will cause each and all of the said suits to be discontinued and abandoned at their own proper cost and expense, and that they will not, nor will any of them, at any time during the continuance of this agreement, make or set up against the said Transit Company the claims and demands alleged in the bills of complaint in said suits, nor directly or indirectly bring or cause to be brought any similar suits at law or in equity making or alleging any claims or demands similar to those set forth in said bills of complaint." (p. 9)

Third. To convey to the New Jersey Company 1,000 acres of their proposed new site in Indiana, located approximately 10 miles from Chicago.

Fourth. For 15 years from the first day of July, 1891, to continue their businesses at Packingtown, and to "guarantee that any and all cattle and livestock slaughtered by them or any of them, or said companies or either of them on their said premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, *and pay the usual yardage and charges therefor.*" (pp. 10, 11)

Fifth. To "guarantee that the said Transit Company shall receive and collect from its yardage and charges on cattle and live stock, owned or purchased by or consigned to said parties of the second part and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. (p. 11)

Eighth. The contracts of the New Jersey Company with both the large and small packers, contain covenants by the packers that *as long as the Yard Company shall conduct its business at Chicago* they will never be interested in any other facility for the receipt and use of their direct shipments. The provision is as follows:

"EIGHTH:—The said parties of the second part further covenant and agree that as long as the said Transit Company shall conduct the business of a general stock yard for cattle and live stock at the City of Chicago, State of Illinois, on its premises aforesaid, or any part thereof, they and said Swift and Company and said Fairbank Canning Company will not, nor will any of them, within the limits of the City of Chicago, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock." (pp. 13, 14)

In consideration of these covenants the large packers as a group received an interest in the Yard Company evidenced by income bonds of the Jersey Company in the amount of $3,000,000. Swift received approximately one-third of these bonds. The small packers similarly received income bonds and cash for like covenants made by them.

It will be seen, therefore, that when the packers entered upon their negotiations with the Yard Company in 1892 they were considering two alternative courses with the New Jersey Company.

The first was to insist upon their right to receive their directs upon their own premises, unloading the stock themselves and avoiding the payment of any yardage charges.

The second alternative under consideration by the packers was to continue the existing practice and so to give up their privilege of receiving their direct shipments at some point other than the public stockyards free from the imposition of any yardage charges, provided they were given an interest in the business of the Yard Company, a voice in its management and a share of its earnings.

The packers made their choice between these alternatives in the contract of 1892. They demanded, and had been tentatively promised a large stock interest in the company, but the demand proved more exacting than the yard interests

could meet. As finally drawn, the contracts gave the packers a large block of the *income bonds* of the New Jersey Company, the return from which was dependent upon the earnings of the Yard Company from its yardage services. Although the contracts are silent as to the voice which the packers were to have in the management of the yards we know that the complainant had at least one representative on the board of the Yard Company.

In consideration of the interest thus acquired in the business of the Yard Company the packers agreed to continue to consign their direct shipments to the yards and to guarantee enough business to bring earnings to a prescribed level, conveyed to the yards their Central Stockyards, and their proposed site 10 miles from Chicago and agreed that never so long as the Yard Company continued in business in Chicago would they use any other yard in Chicago for the receipt of their direct shipments.

The evidence fully supports the following finding of the Commission:

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company

and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards." (R. 45)

E. THE RELATIONS BETWEEN THE YARD COMPANY AND THE PACKERS SUBSEQUENT TO 1906.

The commitment of the packers to continue their operations in Chicago expired in 1906. But their covenant not to use any other yard facilities for the receipt and unloading of their livestock in Chicago runs forever, or so long as the Yard Company continues its business in Chicago. Since the packers did not agree not to move after 1906, they did not unqualifiedly agree to use the Yard Company's facilities after that date. They did agree, however, never to use any other facilities in Chicago for the receipt and use of their shipments so long as the Yard Company maintained its yard there. Consequently, so long as the packers remain in Chicago they are bound. The only concern of the Jersey Company after 1906, therefore, was to keep the packers in Chicago.

The Federal Trade Commission Report (Ex. 59) discusses in much detail the negotiations and the relationship between the Yard Company and the packers, down to the year 1918. Exactly how much those interested in the Union Stock Yards paid the packers subsequent to 1906, and how many of the packers participated in the distribution, the Commission was unable positively to determine. It did find that Armour and Company or J. O. Armour received a large additional interest in the yard's business just about the time the Supreme Court was holding such a transaction to be illegal in the *Pfaelzer* case (226 U.S. 286). The Commission also found that there was evidence from

which it could be inferred that about the same time the other big packers were also given an additional interest in the yard's business. In weighing this evidence, however, it must be remembered that those representing the yard's interests undoubtedly realized that the danger of the packers leaving Chicago became more attenuated each additional year that the move was deferred and may have believed that an arrangement which would hold one of the large packers in Chicago would constitute an adequate safeguard against a move by any of them. The Federal Trade Commission's report shows conclusively that such an arrangement was made with Armour.

The stockholders of the New Jersey Company were informed that it was necessary for the yards to continue to make payments to the packers and that this could best be done by permitting the packers to organize another company which would participate in the earnings of the yards. Upon this understanding the minority stockholders of the New Jersey Company consented to the organization of the Maine Company in 1911. The organization of the Maine Company, the control exercised by that company, the value of the assets which it acquired, and Armour's interest therein, reported in great detail by the Federal Trade Commission, (Ex. 59) are sufficiently indicated by the following excerpts:

> "The secrecy with which Prince and Armour surrounded all their transactions in connection with the Maine company, beginning with the purchase of the New Jersey company's common stock in 1910, and up to the time of the formation of the company in 1911, when dummies were employed in the organization of the company, was emphasized by the issue in 1914 of bearer warrants in lieu of the regular stock certificates which up to that time served as evidence of the ownership of the company." (Ex. 59, p. 264.)
>
> "It is pertinent to inquire into the reasons for the issuance of the bearer warrants in lieu of stock certificates as an evidence of ownership in the Maine company. F. H.

Prince stated to agents of the Commission that in issuing the bearer warrants he was prompted solely by the desire to conceal Mr. Armour's interest in the Chicago stockyards, as *it had always been advertised throughout the West that the management of the yards was absolutely free from control by the packers.* He found that should Armour's interest in the yard become known it would injure the reputation of the Chicago stockyards as an independent market among the livestock raisers.

"Another and perhaps more urgent reason for issuing the bearer warrants may be found in the following clause of the Plan of June 30, 1911, which the stockholders of the New Jersey company were induced to accept:

"No assenting stockholder shall have any interest in any of the shares of the New Company (Maine company) or of the disposition thereof.

"From the facts as developed above, it does not appear that the committee's pledge was taken seriously by the promoters. It has been shown that F. H. Prince and J. O. Armour, who between them held over 33,000 shares of the common stock of the New Jersey company, became the sole owners of the stock of the Maine company. Prince and Armour could not well permit the fact to become known that Prince and Armour were the beneficiaries of the Plan and that the confidence of the assenting stockholders had been betrayed. Had this fact become known the reputation not only of Prince and Armour but of the men who had acted as the committee and of those who had assisted in soliciting the assents would have been weakened in the eyes of the investing public. The bearer warrants were evidently designed in part to forestall such a situation." (Ex. 59, pp. 267, 268)

"The fact that the Maine company owns less than one-fourth of the voting securities issued by the New Jersey company does not, however, prevent the Maine company from actually controlling that company due to the fact that Prince succeeded in being elected president and in securing the election of a sufficient number of his associates as directors in 1911 to insure to him the majority

control of the management of that company." (Ex. 59, p. 251)

"It is desired to point out merely that the stockholders of the company who were asked to give their assents to the Plan of Prince and Armour were not told of the real value of the property and its actual and potential earning power, but other methods were employed which did not disclose the value of their properties.

"In order to summarize the important points brought out in the preceding pages, relating to the financial condition of the New Jersey company, and of its subsidiary companies, in 1911, it should be noted that the combined surplus of the New Jersey company, the Yards company and the Railway company, each of which has been stated individually, aggregated $5,668,899.82. It was also pointed out that certain investments of the New Jersey company were carried on the books of the company at less than their real value, and that both the Yards company and the Railway company had, for several years, pursued a policy of charging additions to, and improvements of their properties to operating expenses which might well have been charged to capital accounts." (Ex. 59, p. 215)

Swift's Efforts to Participate in the Earnings Accruing From Yardage Services Subsequent to 1906.

After a searching investigation, including an examination of Swift's books, the Federal Trade Commission was unable to determine whether Swift succeeded in participating in the yard's earnings subsequent to 1906 as the following excerpts show:

"The report * * * gives evidence showing that Swift and Morris expected to benefit as a result of the formation of the Maine company. It is this evidence, coupled with the fact that the records of the Maine company disclosed lack of regularity in the handling of certain treasury bonds of the company, which gives rise to the surmise that the demands of these packers may have been partly satisfied by the receipt of these bonds." (Ex. 59, pp. 193-4)

"In the absence of any tangible evidence which would show what the ultimate outcome of the subject matter under discussion in the above letters was, further comment can only be based upon speculation. One interpretation which might be offered would be that Swift, or possibly both Swift and Morris, had been given a part, or the whole, of $1,600,000 of Maine company bonds. It has been shown that while Prince has been receiving the interest on $485,000 of the $2,085,000 of bonds received by the Maine company from the New Jersey company and its subsidiary companies no records could be found showing to whom the interest on $1,600,000 of these bonds has been paid.

"F. H. Prince has been examined several times by representatives of the Commission with reference to the disposition of the bonds and the interest paid on them since 1914, but no satisfactory information could be obtained from him on these two points." (Ex. 59, p. 261)

The important thing here is not whether Swift was successful in its efforts to continue its participation in the earnings which accrued from the yardage charges, the collection of which is now alleged to constitute an unreasonable practice. The important thing, for reasons which we discuss later, is that Swift attempted to participate in those earnings through a long period of years. The negotiations undertaken and the efforts made by Swift to accomplish this purpose are developed at length in the report of the Federal Trade Commission. (Ex. 59, pp. 206 *et seq.*, esp. pp. 260 to 263.) In his appearance before a Congressional Committee in 1919 L. F. Swift, while insisting that his later efforts were unsuccessful, testified:

"I know that we wanted this arrangement to continue * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or not threaten to move it, keep still, I might get something after awhile." (Ex. 70, p. 3)

The witness was referring to the arrangement under which his company had acquired an interest in the Yard Company, and

participated with it in the assessment and collection of yardage charges.

Swift had not decided that the assessment of a yardage charge on its direct shipments (which it had then paid for almost 50 years), was an unreasonable practice as late as December, 1913 because it was still seeking then to participate in the earnings from that service. At that time as Swift testified, "I thought Swift and Co. was going to get some consideration; yes, sir." (Ex. 70, p. 16.) In answer to the question whether he "thought the consideration you were going to get would be the equivalent of what you had been getting under the old arrangement?" Swift stated, "I was in hope so." (Ex. 70, p. 16.)

The hearings before the Congressional Committee disclosed that even in 1919 Swift was not sure whether he might reasonably continue to hope that his company would be accorded further participation in the earnings accruing to the yards from its yardage services, or must recognize that opportunity to be gone. (Ex. 70, pp. 22–24.)

F. THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE PACKERS, IN EFFECT, MADE THE UNION STOCK YARDS THEIR OWN TERMINAL FACILITY IN CHICAGO FOR THE RECEIPT AND USE OF THE DIRECT SHIPMENTS OF LIVESTOCK DELIVERED TO THEM THERE.

Even in the absence of the relations between the packers and the Yard Company which we have been discussing, the evidence would show that by the usage and custom of 75 years transportation in respect to this traffic has ended at the unloading pens. Termination at that point is an inseparable part of the very usage and practice which was found by the Commission in *Adams* v. *Mills*, 286 U. S. 397, to have irrevocably marked the unloading as part of the transportation service. This Court sustained the Commission in so finding. It was there found that all of the parties to the transaction had so long treated the loading and unloading service as being included in

transportation that its character as such had become fixed. We are concerned here with exactly the same usage and custom except that it has grown older with the years. The boundary of the transportation service which the Court found had been fixed by that usage and custom is of necessity the boundary here and the evidence shows that the service thus established as transportation includes the unloading and excludes services and facilities after unloading within the yards. The Court has upheld the Commission in finding that long usage and practice at the Chicago yards to be controlling and the evidence here defines the nature and extent of that long established practice with complete exactness.

But the record here goes far beyond mere acquiescence of shippers in a continuing practice of the railroads and the Yard Company to treat the unloading as the boundary line between transportation and stockyards services. In the relations of the packers with the Yard Company we have facts showing an express, affirmative acceptance of the practice by the shippers, circumstances not present in *Adams* v. *Mills*. More than that, the facts show that the packers actually became the partner of the Yard Company in imposing the yardage charge on all stock unloaded, that they guaranteed and participated in the earnings from that service, obtained a voice in the management of the business, and finally, abandoned their own unloading facilities and agreed so long as they remained in Chicago to take their stock at the Union Stock Yards, thus, in effect, and in return for an interest in the business, making that yard their own facility.

The trunk line railroads were complete strangers to the action taken by the packers to obtain an interest in the earnings accruing to the Yard Company from yardage service on direct shipments. In the transactions and negotiations which began at least as early as 1890, and continued for many years, the railroads had no part. The packers recognized that the railroads were in no way concerned with the handling of the stock following the unloading, that the yardage service was not part of

transportation, and had not been paid for in the transportation rate, but was a service to be bought and bargained for through negotiations with the Yard Company. This is the interpretation which the packers themselves placed upon the usage and custom, both in making the contract of 1892 and in negotiating for a continuance of the "arrangement" over a period of many years. So much for the proof which these transactions offer that complainant has long understood the effect of the established custom and usage and fully accepted its validity.

We submit that the evidence supports the Commission's findings, as follows:

> "From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers." (R. 42)
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> * * * * *
>
> "The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned." (R. 44)

But, as stated, the proof goes much further. It shows that complainant became a partner of the Yard Company in the imposition of yardage charges on every animal unloaded in the yards. It shows that complainant shared the responsibility of that practice and in return for a share of the earnings from that service, guaranteed that those earnings would be maintained at a certain level, conveyed title to its own unloading facilities,

and agreed, so long as the Yard Company continued in business in Chicago, never to use any other yard for the receipt of its stock.

The Commission summarizes its long detailed findings on the history of the custom and practice respecting the delivery of livestock at this yard "and the action of the parties in relation thereto"[1] as follows:

> "For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago." (R. 46)

Swift charges (its brief, p. 65) that the Commission erred in giving any weight to the facts upon which these findings were based, because in doing so "the Commission attempts to apply the doctrine of estoppel * * *." In view of the nature of this evidence it is natural that Swift would think of the doctrine of estoppel, but the Commission does not apply or even refer to that doctrine. In order to pass upon the reasonableness of the assailed practice the Commission investigated its history "and the action of the parties in relation thereto."[1] The controlling importance of the evidence is that it shows not only that transportation at this yard has always ended with the unloading, but shows also that all of the parties have participated in and recognized the reasonableness of that practice.

The report of the Federal Trade Commission which was in evidence before the Interstate Commerce Commission, and from which the latter learned the full history of the yardage charge and the contractual relations between the packers and the Yard Company in respect thereto, led the Congress to enact the Packers and Stockyards Act, 1921, by which the Yard Company was compelled to file its yardage charges with the Secre-

[1] *Adams* v. *Mills, supra.*

tary of Agriculture. In *Stafford* v. *Wallace*, 258 U. S. 495, (1922), this Court passed upon and sustained the constitutionality of the Packers and Stockyards Act. In his statement of the case, Chief Justice Taft quoted the finding of the Federal Trade Commission in the same report, that the packers' participation in the stockyards business at the primary markets had given them control over the yardage charges as follows:

> "'The packers' power is increased by the fact that they control all the facilities through which live stock is sold to themselves. Control of stockyards comprehends control of live stock exchange buildings where commission men have their offices; control of assignment of pens to commission men; control of banks and cattle loan companies; control of terminal and switching facilities; *control of yardage services and charges;* control of weighing facilities; control of the disposition of dead animals and other profitable yard monopolies; and in most cases control of all packing house and other business sites. Packer owned stockyards give these interests access to records containing confidential shipping information which is used to the disadvantage of shippers who have attempted to forward their live stock to a second market.' Summary of Report of the Federal Trade Commission on Meat Packing Industry, July 3, 1918." (pp. 500–501)

II

THE COMPLAINT PRESENTED ADMINISTRATIVE QUESTIONS WHICH REQUIRED THE EXERCISE OF THE INFORMED DISCRETION OF THE COMMISSION.

A. THIS COURT HAS REPEATEDLY HELD THAT THE ISSUES BEFORE THE COMMISSION IN THIS CASE ARE NOT PURE QUESTIONS OF LAW BUT ARE ADMINISTRATIVE QUESTIONS.

In view of the character and the weight of the evidence which the Commission had before it here, for the first time, it may readily be seen why Swift does not question the Commission's

decision as lacking support in the record. Instead, Swift seeks to disregard the evidence by arguing that the issues of this case are "non-factual," that there are no administrative questions here and, as a matter of law, that Swift is entitled to require the line-haul carriers to extend their services beyond the point at which those services have always terminated throughout the entire history of the Chicago Union Stock Yards.

The fundamental issue before the Commission was stated in its report as follows:

> "The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge." (R.46–47)

After full consideration of the evidence discussed above, the Commission made the following specific finding:

> "We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.
>
> "We further find that defendants' failure to afford egress for shipments of livestock described in the preced-

> ing paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice." (R. 55)

Swift attacks the Commission's decision by asserting that, as a matter of law, the Commission was bound to find that transportation did not end at the unloading pens. It claims a legal right, under its construction of the word "transportation" in the Interstate Commerce Act, to demand that the transportation duties of the line-haul carriers, which heretofore have always terminated at the unloading pens, should extend through the stockyards to the adjacent public street. (Brief, pp. 12 to 30)

As Swift phrases it, "The principal contention is that the Commission and the District Court made fundamental errors in their construction of the law." (Swift brief, p. 4) Its statement of the question to be decided is introduced with the words "May appellants lawfully demand the right * * *." (p. 2) It argues that "egress is required as a matter of law." (p. 33) The issues of the case, it says, are "non-factual." (pp. 84, 85) Although it filed its complaint with the Interstate Commerce Commission, it now argues that the Commission actually had no administrative discretion. This Court, it urges, should vacate the Commission's order upon a mere reading of the statute on the ground that, by order of the statute, Swift had the right to demand that the transportation of its direct shipments of livestock consigned for delivery at the Chicago Union Stock Yards should no longer terminate at the unloading pens in the yards but should extend to public streets beyond.

Swift is not alone in urging this contention, for Armour, which has intervened in this proceeding, has filed a long brief prefaced with the following words:

> "While intervener entirely supports appellants on such assertions, this brief is written upon the assumption that every finding of fact made is supported by substantial evidence; that the evidence requires no findings which were

not made, and that each finding of the Commission has been found by this Court to be true, correct and adequately supported by evidence. * * *

"This brief will start with that point, and attempt to establish that even so, there remain patent misinterpretations and misapplication of principles of law to such facts. And we shall attempt to prove such errors by application of simple rules of grammar and etymology to the Statute in question, and by analysis of the decisions of this Court relating to the subject matter." (pp. 1, 2)

The decisions of this Court are directly contrary to appellants' contentions. It has long been held that whether a certain service is a part of "transportation" is not a pure question of law, but is, instead, dependent upon the facts, and that when the Commission has decided that a certain service is or is not transportation, the finding will be sustained if there is evidence to support it.

Three of the cases so holding were concerned with the scope of transportation of livestock shipments at this same Chicago Union Stock Yards: *Adams* v. *Mills*, 286 U. S. 397 (1932); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Armour & Co.* v. *Alton R. Co., et al*, 312 U. S. 195 (1941). An examination of these cases will show how erroneous is Swift's theory that the limits of transportation are to be determined as a question of statutory construction. The *Armour* case is conclusive upon the point, but we shall discuss the decisions chronologically in order that the Court may have before it the development of the rule which governs the case.

1. *The decision in Adams* v. *Mills.*

Adams v. *Mills*, 286 U. S. 397, arose out of an increase in the unloading charge by The Union Stock Yard and Transit Company without the sanction of the Commission. The Commission held that the unloading of the livestock at that yard was a part of transportation, and, on the basis of that finding,

issued a reparation order. In the suit to enforce that order, it was asserted that, as a matter of law, the unloading was not a part of the transportation service. The Court overruled the argument and sustained the order of the Commission, holding that the determination of the question as to what was included in the transportation service was dependent upon the facts, and was a matter for the informed judgment of the Commission. In the opinion Mr. Justice Brandeis said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311." (pp. 409–410)

The Court then reviewed the evidence before the Commission which, it held, sustained the findings of the Commission respecting the scope of the service. It laid particular stress upon the fact that although "throughout the United States, the duty of unloading carload freight rests ordinarily upon the consignee," the history of the practice at the Chicago Union Stock Yards showed that a different practice had been in effect there, accepted by all the parties, ever since the organization of the Yard Company. It pointed out that for several years the Yard Company had filed a tariff with the Commission showing the unloading charge as a transportation charge, and that the usage and physical conditions justified the Commission's decision that "no reason existed for permitting a departure from that practice." (p. 415)

The evidence here shows, as the Commission has found, that from the beginning in 1865, and at all times since, "there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards." (R. 42) The unloading service involved in *Adams* v. *Mills* was on one side of that line, the services involved here were on the other. Consistently with the practice so long in effect, this Court, in 1912, required the Yard Company to file a tariff with the Commission covering the unloading service,[1] and in 1921 when the Packers and Stockyards Act was passed the Yard Company filed its tariff with the Secretary of Agriculture, covering the separate and distinct charges which it had always imposed on all animals received at the yard.

The ruling in *Adams* v. *Mills* is, we believe decisive of this appeal. In both cases the question before the Commission was whether transportation of livestock to the Chicago Union Stock Yards included a particular service. In *Adams* v. *Mills* the service was unloading; here it is the removal of the animals out of the stockyards after they have been placed within the yards by order of the shipper. In both cases the Commission, upon the basis of extensive evidence, made its finding as to the scope and the limits of the transportation service. In both, the established usage and the physical conditions were found to justify the existing practice. The similarity continues, since in both cases the challenge of the Commission's finding in this Court rested on the theory that the definition of "transportation" is a matter of law, i. e., in the words of Swift, a "nonfactual issue," which should be settled by a judicial construction of the words of the statute rather than by an administrative judgment. The rule stated by Mr. Justice Brandeis in *Adams* v. *Mills* is the answer to Swift's claim here. It is significant that Swift makes no mention of *Adams* v. *Mills* in its argument that the

[1] *United States* v. *Union Stock Yard and Transit Co.*, 226 U. S. 286.

administrative judgment of the Commission should be set aside upon a reading of the statute, and elsewhere in its brief refers to that case only incidentally. (p. 42)

2. *The decision in the Hygrade case.*

The rule enunciated in *Adams* v. *Mills* was applied by this Court again in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935), usually referred to as the *Hygrade* case. The Hygrade Company, unlike Swift and Armour, proceeded before the Commission against the Yard Company as well as the line-haul carriers, complaining of the yardage charge of the Yard Company on Hygrade's direct shipments consigned to the Chicago Union Stock Yards. The Court's opinion, reviewing the Commission's decision, heavily stressed again the factual character of the issues. Reference was made to *Adams* v. *Mills* as follows:

> "Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams* v. *Mills*, supra, 410 *** *Usage and physical conditions combined* definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by Section 15(5)." (pp. 200–201)

The Commission's decision was reversed because it "made no definite finding as to what constitutes complete delivery or where transportation ends." (p. 201) The decision of those questions, it was held, was a matter for the Commission and not for the Court. The Court recently referred to its decision in the *Hygrade* case as follows:

> "There the Commission's order directing the discontinuance of appellant's yardage charge to consignee was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish." *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213. (1939)

It is apparent from this quotation, as it was from the *Hygrade* opinion, that the Commission's action was not set aside on the ground that, as a pure question of law, the transportation duties of the line-haul carriers terminated at the unloading pens, but because the findings of fact which determine these issues are for the Commission and it had not, in that case, made them sufficiently clear.

Unlike its report in the *Hygrade* case, the Commission's findings here are so full that their adequacy is not questioned. It may be noted, too, that the record before the Commission in the *Hygrade* case has been shown by the record here to have been peculiarly incomplete. As we have pointed out, many of the essential facts have been introduced for the first time in this case. These include a full showing as to the optional Chicago delivery points, other than the public stockyards, to which shippers who desire to pay no yardage charge can and do consign their directs, the adequacy of those delivery points to handle all shipments consigned for delivery there, the practice of Swift itself in the receipt of its direct shipments, and the active participation and profit of the packers in the establishment and maintenance of the delivery practice which has been in effect at these yards since the Civil War. With the full facts before it, the Commission has recognized that the conclusion reached by a majority of the Commissioners on the partial record in the *Hygrade* case was not tenable.

3. *The decision in Armour* v. *Alton R. R. Co.*

The decisions in *Adams* v. *Mills* and the *Hygrade* case provided the background for a decision at the last term of this Court which, we submit, is conclusive against the sole argument which is again urged by the packers here. With the same factual situation and the same issues before it in that case as here, the Court held that the issues arising from the demands of Swift and Armour cannot be disposed of simply as a problem of statutory construction, as Swift and Armour urge, but that the

decision of the issues lies within the field of informed administrative judgment vested in the Commission. *Armour & Co.* v. *Alton R. Co. et al.*, 312 U. S. 195 (1941)

The demands of Armour and Swift against the line-haul carriers were identical and were made jointly. Armour, which is under common control with the Yard Company, sought to avoid the jurisdiction of the Commission by instituting its suit in court; Swift began its suit before the Commission. Armour then intervened in the Swift proceeding, alleging that it had instituted a suit in court "on the same facts and same subject matter." (R. 124) The relief demanded by Armour in its complaint in court was the same as that sought by Swift before the Commission. The issues were the same. The relationship of the cases was noted by this Court, which said:

> "The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. R.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits." 312 U. S. 195, 202.

Armour contended that the issues raised by the packers' demand upon the line-haul carriers were of a strictly legal character and that the doctrine of primary jurisdiction in the Commission was therefore not applicable. Nothing was necessary to the disposition of its demand, Armour argued, save a construction of the statute and the application of various court decisions. It was contended that the Commission would have no alternative under the law but to grant the packers' demand, that no administrative question was presented, and therefore, that the doctrine of primary resort was inapplicable.

These arguments, one and all, were rejected in the *Armour* decision. In accordance with the established rule, the Court

held that the issues present administrative problems, that there is no rule of law that the transportation service in respect to livestock consigned to the public yard in Chicago continues through the yard to the public streets beyond, and that it is for the Commission to determine, on the basis of the evidence, where transportation terminates. The Court's opinion on this fundamental issue reads in part as follows:

> "Basically, on the merits the issue here presented is whether Armour and Company, one of the packers, is correct in its contention that under the facts of this case the railroads must deliver its shipments of livestock at such a location and in such a manner that it need pay no 'yardage charge' to the Stock Yards Company. * * The ground on which the Circuit Court affirmed was that *the issues involved presented administrative problems*, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion.
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> "This statement of the facts alleged in the complaint reveals that there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock. For illustration:
>
> "FIRST. At what point did the common carriers' duty to transport come to an end? *Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.*"—312 U. S. 195, 196, 200.

Here is the repudiation by this Court of the theory advanced by Armour and now urged again both by Swift and by Armour. In the clearest terms, the Court established that the Commission had the statutory authority, which Swift denies, to determine the point at which transportation of these direct shipments terminates. Of necessity, the Commission's authority

is not limited to determining the case in favor of the packers. "If there was evidence to sustain the Commission's findings on these matters, its conclusion * * * must be sustained." *Adams* v. *Mills*, 286 U. S. 397, 410.

Swift asserts over and over throughout its brief that we contended below, and will contend here, that the holding in the *Armour* case has put the Commission's conclusion here beyond the scope of judicial review. That, of course, has never been our position. But we do contend that the *Armour* case is decisive against the particular attack and the only attack which Swift is actually making upon the Commission's conclusion. Swift does not seek judicial review of the adequacy of the evidence to support the Commission's findings. Rather, its contentions are identical with those relied upon by Armour and overruled by the Court in the *Armour* case. Armour said that it did not need to present its case to the Commission because the packers had an absolute legal right to demand that the services in question be furnished as a part of the transportation service. Swift says that although it presented its case to the Commission, that expert body had no alternative except to issue an order in favor of the packers because, it is said, the packers have an absolute legal right to demand the extension of the transportation services beyond the unloading pens. The Court's denial of this argument in the *Armour* case is equally applicable here.

The determination of the point at which transportation of these shipments at the Chicago Union Stock Yards terminates is only one of several administrative issues pointed out by this Court in the *Armour* case. The fact that this case necessarily involves the Commission's rate making function was expressly recognized, the Court stating that a judgment in favor of Armour "would in effect constitute a readjustment of their rate schedules." (312 U. S. at 201) Moreover, the Court said:

> "FOURTH. If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not

now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary." 312 U. S. at 201.

The practical application of this vital consideration is evidenced by the Commission's report in this case. (R. 52-53) Swift has suggested only two "possible means of egress" to the public streets. (Swift brief, pp. 81–82) The first of these is egress to what is known as Packers Avenue, which is not a public street at all but is part of the private property of Swift. (R. 361) In return for the Yard Company's charge, Swift's livestock unloaded at the yard has always been taken across the yard to Swift's own property. What Swift asks is that the transportation service on livestock consigned to the yard, end not at the yard, but continue beyond that point until the animals are deposited on Swift's own property. The other alternative, which is the only suggested possible exit to a public street, would require the use not only of the Yard Company's ways and facilities between the unloading pens and the boundary of the yards, and the handling of the animals to that point, but also the use of a bridge over Halsted Street (a major thoroughfare) and facilities on the other side of the street from the stockyards to bring the animals down from the bridge to an alley.[1] (R. 357–358) These facilities are at present used by all the

[1] It is somewhat remarkable that Swift seeks to distinguish this case from the *Hygrade* case by the fact that the *Hygrade* shipments used a tunnel under the street for egress while the Swift shipments, on Swift's suggested means of egress, would, instead, use a bridge over the street, both the tunnel and the bridge being property of the Stock Yards Company. (Swift's brief, pp. 81–82) The Commission found that "the alleged difference is not one of substance." (R. 48)

packers whose plants are located east of the stockyards, not only to remove their direct shipments, but also to remove the animals they have purchased in the yards. (R. 359–360) The Commission did not find that it would be practicable for these properties to be taken over by the railroads or that the suggested facilities could handle the great volume of Swift's direct shipments without causing undue congestion with the animals of the other packers or blocking the public ways at the point of egress of the animals. On the contrary, it made this finding:

> "The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago." (R. 53)

Swift seeks to distinguish the holding in the *Armour* decision that administrative questions exist in respect to the adequacy of the existing facilities as follows:

> "The terminal facilities are those which the carriers now use under lease. It is not suggested that additional terminal facilities should be provided by the carriers or that they should acquire additional property." (Swift's brief, p. 87)

Both statements are erroneous. There is no lease by the trunk lines of any of the facilities at the stockyards. The charge of the Yard Company for the service of unloading the animals into the unloading pens is paid for out of the line-haul rate, but even if that charge were argumentatively to be called a "lease" (which it is not) it would cover only the facilities necessary to the unloading service, not the facilities of the Yard Company beyond the unloading pens, within the yards.[1] The foregoing factors as to the physical situation emphasize the importance of the administrative question noted by the Court in the above quotation.

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[1] During the long period when the Yard Company was contesting its status as a common carrier by reason of its loading and unloading services, it incorporated in its tariff filed with the Commission the statement that in the performance of

Finally, the Court in the *Armour* case decided that the precise definition of a station area is not a matter of law but is a question for the Commission. The Court said:

> "SIXTH. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission." 312 U. S. at 202.

Swift seeks to avoid this holding by the following argument:

> "No such question is involved in the pending case. The station area is not in dispute. It consists only of the pens and chutes rented by the railroad defendants from the stock yard company for unloading and delivery of shipments of live stock transported to Chicago."[1] (p. 89)

Swift here concedes that the facilities of the Stock Yards Company beyond the unloading pens are not part of the station area. Since that is so, the railroads should not be required to provide those additional facilities. Quite aside from this concession, however, the Commission's finding that the practice is reasonable is supported by the evidence and therefore is, we believe, conclusive.

The treatment of the *Armour* decision in the briefs of Swift and Armour on the present appeal serves to emphasize the fact that the Court there held that the issues raised by the packers' demands cannot be determined as non-factual matters

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those services it was acting as the "agent" of the line-haul carriers. Swift's effort to attach significance to that self-serving phrase of the Yard Company is misplaced, since it referred only to the loading and unloading and not to the services and facilities involved in the removal of the animals from the yard.

[1] Swift's error of fact in stating that the pens and chutes are "rented," has been referred to above.

of law. Armour has filed a forty-seven page brief here in which it cites the same cases and makes the same arguments that were contained in its brief before the Court last year. The most striking feature of its present brief is that there is not the slightest effort to distinguish that decision; in fact, there is not a single citation or mention of the *Armour* decision! What Armour is doing, as intervener here, is to seek a reversal of the *Armour* case, without a single reference to the decision which it is seeking to thwart.

Swift's brief contains a detailed attempt to distinguish the *Armour* case, but the nature of the attempted distinctions show that Swift is simply rearguing the issue decided in that case. After quoting the holding that the issues are administrative, Swift says that the application of that holding to this appeal is merely to establish that this proceeding was begun before the proper tribunal. (Brief, p. 84) Swift is unwilling to recognize the obvious, that since the issues are administrative, it is in error in urging that these issues are non-factual and involve simple statutory or legal construction. Cf. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, 292 (1922).

Swift next argues that "The court did not, in the Armour decision, place the present case beyond the confines of judicial review." (Brief, p. 84) This argument is an oblique effort to avoid the holding quoted above (p. 55) that resort to the Commission was necessary here because the point where the transportation comes to an end is not marked by the statute or governing law "under all circumstances and conditions and in all cases." The fact is, of course, that no one has ever argued that this case is "beyond the confines of judicial review." What is very earnestly argued, by the Government, the Commission, and the railroad interveners alike, is that the single point on which Swift seeks judicial review is precisely the point that the Court has just decided adversely to its conten-

tion in the *Armour* case, namely, that the issue here is of an administrative character and is not an issue of law.

Swift's most extraordinary use of the *Armour* case is its repeated argument that the following portion of the *Armour* decision "definitely settles the point that the Commission has, and therefore should exercise, the jurisdiction which it disclaimed in the present case" (Swift brief, p. 86):

> "*If* use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and *if* this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission." 312 U. S. at 200–201.

Swift quotes this statement at four places in its brief (pp. 25, 32, 41, 86) and reiterates the argument without quotation elsewhere. (p. 18) It seeks to use these words as if they constituted a holding by the Court that the use of the facilities within the yard is a part of transportation, that it is a service for which reasonable compensation is justified, and that therefore the Commission has jurisdiction to fix the rate to be assessed for the service and should do so. Swift would thus entirely disregard the fact that the Court's statement is a conditional one. We think it would have been impossible for the Court to have stated more plainly its holding that there were conditions precedent to the Commission's jurisdiction over the yardage charge, and that those conditions involved the determination of administrative problems for the Commission, and were not pure matters of law for the courts. It was only by a determination of the very question which this Court held that the Commission must decide that the Commission reached the conclusion that it lacked jurisdiction over the yardage services. The issues were left by the Court to the Commission and the

Commission has resolved them against the contentions of the packers.

4. The foregoing decisions are illustrative of the settled rule.

The three cases which have been discussed, namely *Adams* v. *Mills*, the *Hygrade* case and the *Armour* case, all dealing with the situation at the Chicago Union Stock Yards, establish that the issues of this case are administrative and that since the Commission's decision is supported by the evidence, it should be sustained. These cases do not stand alone. They represent specific applications of the general rule that the questions of where transportation duties end or begin, and of the kind of facilities which should be furnished by the carriers, are not pure questions of law but are matters for the informed judgment of the Commission. For example, in *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), the question was where transportation began with respect to certain shipments of coal. The plaintiff argued that, as a matter of law, transportation began at the station and not at the mines. The Court denied this contention and held that the question was one for the Interstate Commerce Commission, saying:

> "But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight.
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> "In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act." (pp. 263, 264.)

Similarly, in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402 (1937) it was held that the determination of

the extent of transportation is a matter for the Commission and not for the courts. The Commission had decided that the spotting of cars on industrial plant tracks, in the circumstances there present, was not part of the transportation service and had ordered the railroads to cease rendering the service under their line-haul rates. The decision of a District Court setting aside the Commission's order was reversed by this Court, which said:

> "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."[1] (p. 408.)

This decision was relied upon and followed in *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156 (1938). The *Los Angeles Switching Case*, 234 U. S. 294 (1914), is to the same effect.

In a similar case, the court in *Louisville Cement Co.* v. *U. S.*, 19 Fed. Supp. 910 (D. C. W. D. Ky., 1937), refused to set aside the order of the Commission, saying:

> "It is frequently difficult to determine when delivery is completed or transportation begun. It is a question of fact, and the Interstate Commerce Commission is peculiarly fitted to determine at what point the carrier has begun or completed straight transportation. * * *
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> "The Commission had the authority to determine in the instant case where transportation under the line haul charge ended." (p. 916.)

In *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43 (1916) the question was whether the carrier had failed to perform its "duty to furnish adequate cars." The plaintiff's claim there was identical in principle with that of Swift here, that the carriers

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[1] The Court also said: "The Commission found that line-haul rates had not been fixed to compensate the carriers for the services in question." (p. 404.) The Commission has made an identical finding in the *Swift* case as follows: "They [the defendants] have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens." (R. 45)

have failed to perform their duty to furnish adequate facilities for delivery. This Court held:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative." (R. 50.)

In view of these decisions, there was nothing novel in the holding of the Court in the *Armour* case that the questions raised by the packers' demands, such as the question whether transportation ended at the unloading pens or at the boundaries of the Yard, could not be resolved by a judicial construction of a statute or case law but required the exercise of expert administrative judgment. Since there is no contention here that the evidence before the Commission failed to support its judgment, the issues, we believe, have been settled by the Commission's decision. The decision depended upon the usage and practice, upon the peculiar physical conditions at the Union Stock Yards, and upon the availability of other points for delivery of Swift's direct shipments to Chicago. Such factors as these make the question one which, in the language of Mr. Justice Brandeis, "is essentially one of fact and discretion in technical matters." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

5. The Commission's decision is supported by the decisions of this Court and the Commission in the Covington cases.

In the *Armour* case, Armour argued that *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128 (1891), supported its claim

that the issues raised by the packers' demands were not administrative. The Court rejected this contention. It stated that the controlling issue was not determined "by any applicable principle of governing law" (312 U. S. 195, 200) and then commented specifically upon the *Covington* case, noting that it was begun before Congress adopted the Interstate Commerce Act and that it "is not determinative of the respective jurisdictions of the courts and the Commission in this case." (312 U. S. at 200) Both Swift and Armour now reargue the same point, again contending that the *Covington* decision is authority that as a matter of law, and without regard to the factual situation, the line haul carriers are obligated to provide the facilities necessary to remove the livestock from the yard to which it has been consigned. The short answer to this argument is the Court's comment in the *Armour* case quoted above.

The facts and holding of the *Covington* case are, however, of interest here since it was apparently that case which led to the construction by the packers of their own Central Stock Yards at Chicago and their demands upon the Chicago Stock Yards Company culminating in the agreements of 1892. By their actions the packers demonstrated in a practical way that they fully understood the actual holding in the *Covington* decision which is very different from the construction which they place upon it here. We think it doubtful if any decision of this Court has ever been the subject of more misstatement and more misuse than that in the *Covington* case both in this proceeding and in the *Armour* case. In the interest of accuracy, we desire to direct attention to the actual holding in the case.

The evidence in the *Covington* case showed that deliveries were currently being made at unloading platforms provided by Keith along the railroad's track, just as Swift is now receiving its stock at its own yard. Later, the receiver of the railroad caused these platforms to be torn up. The railroad by contract with the Covington Stock Yards Company had expressly made

the yards of that company its "depot for delivery of all its livestock" during a fifteen-year term, and had agreed that it would not "allow to be built on its right-of-way any other depot or yards for the reception of livestock." Keith was thus compelled to take delivery there and to pay a "lottage" (or yardage) charge on such receipts in order to get them out of the Covington Stock Yards. Under these circumstances, the Circuit Court issued an *alternative* decree quoted in full in the Supreme Court opinion. The decree was to the effect that if the stockyards filed its consent, the railroad should deliver Keith's livestock at the Covington stockyards free of any charge for passing through the yards; in that event the railroad would not have to deliver at Keith's platform or any other point. This, however, was *not* an absolute order. In case the stockyards failed or refused to file such a consent, the decree laid no obligation upon the railroad to make such delivery through the property of the stockyards free of charge. It merely ordered into effect the second of the alternatives (and this was the only part of the decision appealed from) that if Keith, *the shipper*, restored the unloading platform and chute on his land adjacent to the tracks of the carrier, the latter would be obligated to deliver to that platform all livestock consigned for shipment thereto.

The Supreme Court affirmed this decree. As clearly appears from the quotation below, the affirmance was based solely upon the ground that the carrier could not rightly refuse to deliver the livestock to the consignees' own stockyards and thus force him to accept his livestock at another yard and submit thereto the payment of an additional charge for yardage.

> "But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err *in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees*

at their own stock yards in the imm diate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation." 139 U. S. at 136.

A decree for Swift here such as that entered in the *Covington* case would have been equivalent to a dismissal of this complaint. An alternative order requiring the railroads either to deliver the stock at the Chicago Union Stock Yards without the assessment of a yardage charge, provided the Union Stock Yards should consent to withdrawing that charge, or, in default of such consent that the railroads be required to deliver without extra charge to Swift's own yard would leave the situation exactly as it is. Just as the trunk lines were willing to make deliveries at the packers' new Central Stock Yards in 1891, and actually attempted to do so, they have been, and are now, ready and willing to make such deliveries at Swift's own facilities (or at the other delivery points), and appellant is actually receiving all its livestock there.

It may be noted that at Covington the railroads had been making free delivery at Keith's unloading platforms for some time before refusing to make further deliveries there. At the Chicago Union Stock Yards yardage charges on directs have always been levied and have always been paid by the packers. Furthermore, at Chicago, in place of a contract such as that existing at Covington between the railroads and the Covington Stock Yards, making the latter the railroad's "depot for delivery of all its live stock," and restricting the making of deliveries at other points, there is a contract to the same effect but it is between Swift (and the other packers) and the Union Stock Yards.

In this connection we direct attention also to one of the first cases decided by the Commission. *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 601 (1887). This case involved the same facts as those in the Supreme Court decision in the *Covington* case. Keith complained that the railroads were exacting unjust charges, in that all cattle consigned to Keith were compelled to pass through the Covington Stock Yards, although Keith had convenient stockyards of his own. The Commission found that the exaction of a charge for passing through the yards of the Covington Stock Yards Company prevented the complainants and their customers from shipping or receiving livestock on equally favorable terms with the customers of the Covington Company, and issued its order as follows:

> "Until the defendants provide some other suitable and convenient place at Covington, where the complainants may ship and receive live stock free from other than the customary transportation charges, *the defendants should be and will be required to receive from and deliver such live stock to complainants at their own yards.*" (p. 603)

Thus, the Commission did not take jurisdiction of the yardage charges at the Covington Stock Yards and did not order that deliveries at those yards should be made without the exaction of yardage charges. Here again, as in the Supreme Court's decision in the *Covington* case, there is an express recognition both of the absence of any obligation on the part of the railroads to cause the Stock Yards Company to remove its yardage charges assessed against the consignee where the railroad is willing to deliver elsewhere, and of the importance of alternative points of delivery in relation to the obligation of the railroads.

The decrees of the court and of the Commission in that litigation illustrate the complexities of the question and its dependence upon the factual situation rather than the application of an automatic rule of law. That the packers fully understood the holding is demonstrated by their action in the early nineties.

Instead of demanding that the carriers provide free egress from the Union Stock Yards, they built their own stockyards, like Keith at Covington, and then demanded that deliveries of their directs be made to those stockyards.

In an effort to offer some explanation for the packers' affirmative acceptance of the Yard Company's right to assess a yardage charge on every head of the direct shipments of livestock received through its yards, Swift says now that on July 1, 1891, the effective date of the packers' contract with the Yard Company for the delivery of the direct shipments at the Union Stock Yards, it was not clear that there was any remedy for the packers' "grievance other than to move their plants from the Union Stock Yards or to enter into the compromise contract." (Swift Brief, p. 65.) It will be noted that the date so specified was subsequent both to the Commission's decision in the *Covington* case (1887) and to this Court's decision in the same case, (March 2, 1891) and was prior to the execution in 1892 of the packers' contract with the Yard Company. Thus, according to Swift, the packers recognized at that time that a claim to receive their direct shipments through the property of the Yard Company free of the yardage charge would find no support in the *Covington* case. The fact was, of course, that the packers never had any such "grievance" and, instead, affirmatively agreed at all times that the practice with regard to the yardage charge on direct shipments received through the stockyards was entirely reasonable. Only in the last few years have the packers sought to place a different meaning upon the *Covington* case.

B. SWIFT'S PRESENT INTERPRETATION OF SECTION 1 (3) OF THE ACT IS CONTRARY TO THE INTERPRETATION OF THAT SECTION BY SWIFT AND ALL PARTIES SINCE ITS ENACTMENT.

The present position of Swift and Armour as to the interpretation of the Interstate Commerce Act is contrary to the long standing interpretation of that Act by all the parties

interested in the Chicago livestock situation, including the packers. Armour characterizes its argument as an "application of simple rules of grammar and etymology." (Brief, p. 2.) It consists of a quotation from Section 1 (3) of the Act,[1] followed by a contention that by law one of the "services in connection with the * * * delivery" of the shipments of directs consigned to the Chicago Union Stock Yards is necessarily the provision of facilities and services for taking the animals out of the stockyards to the public streets.

To appraise this argument, it is necessary to recall that ever since 1865 the Yard Company has assessed and collected for itself a so-called yardage charge on every animal "received" at its yards regardless of the extent of the use of the facilities of the Yard Company for the particular shipment. The collection of that charge was constantly a matter of great moment to the packers. Three generations of skilled counsel for the packers have reviewed it. If the charge had ever been thought to be unlawful, as a matter of "grammar and etymology" or otherwise, it must be assumed that it would have been protested and would have been attacked by a suit in the courts, a proceeding before the Commission, or, within the last twenty years, before the Secretary of Agriculture. No such protest was ever made. Yet, on the theory argued by Swift and Armour, that charge was illegal at common law and has been illegal under the Interstate Commerce Act for many years.

The packers' interpretation of the common law, Section 1 (3) of the Interstate Commerce Act and the other sections of that

[1] Sec. 1(3): "* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with the* receipt, *delivery*, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (49 U. S. C. § 1 (3))

Act as laying no obligation upon the railroad to provide transportation beyond the unloading pens at the Union Stock Yards is emphasized by the position taken by them in the repeated examinations by the Commission into the transportation services performed at those stockyards. Soon after the passage of Section 1 (3) in 1906, the Commission instituted an action against the Yard Company to compel it, among other things, to file tariffs covering its transportation charges. The action resulted in a decision by this Court, holding that the Yard Company is a common carrier subject to the Act, and ordering it to file its transportation charges. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286 (1912). The tariff which was filed in accordance with that ruling contained the loading and unloading charges but did not contain the yardage charges. If the packers had interpreted Section 1 (3) the way they now urge the Court to construe it, they would, of course, have objected that the Yard Company had failed to comply with the Court's order. Instead, they raised no claim that the yardage charges on direct shipments were illegal or should be treated as transportation charges.

Moreover, Swift was a party to the extensive investigation of the Yard Company's activities resulting from that company's cancellation of its I. C. C. tariff in 1917, but made no suggestion that the charges on direct shipments were transportation charges or that the established practice was unlawful or unreasonable. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); 58 I. C. C. 164 (1920); award sustained in *Adams* v. *Mills* 286 U. S. 397 (1932).

In its exceptions brief before the Commission in this proceeding, Swift advanced three reasons to reconcile its long continued acceptance of the practice and its active participation in the assessment of the yardage charges with its present argument that the charges are illegal. All three of them were wrong in fact, and they have been abandoned here. They are, neverthe-

less, important as indicating the actual position of Swift during those years as contrasted with its attempted explanation.

The reasons were advanced under the following heading: "It was not clear that complainant had any remedy, other than mutual agreement of the parties, for a number of years." The first was as follows:

> "After the expiration of that contract,[1] and in view of the fact that it could not be renewed because of the passage of the *Elkins Act*, consideration should be given to the situation in so far as any relief by way of a legal proceeding was involved. * * * The definition of 'transportation,' now contained in section 1 (3) of the Interstate Commerce Act, did not, until the passage of the Transportation Act in 1920, read as follows:
>
> > 'irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' (See Interstate Commerce Acts Annotated, vol. 1, p. 229.)
>
> "It was therefore not at all clear prior to that time that the Interstate Commerce Act placed upon the carriers any duties which could be specifically enforced as to local deliveries." (Swift's brief, March 30, 1939, pp. 152, 153.)

In advancing this excuse for the packers' failure to claim that Section 1 (3) gave them any right to obtain egress for their direct shipments free of the yardage charge, counsel evidently overlooked the fact that this portion of the Act was added, not by the Transportation Act of 1920, but by the Act of June 29, 1906, and has not been changed since 1906. (34 Stat. 584.) It was as much available to Swift in every year since 1906 as it is today, yet Swift and its counsel, as did all the other interested

[1] Swift refers to the expiration in 1906 of certain terms of its 1892 contract with the Stock Yards Company; as already noted, one of its vital provisions is still in effect.

parties, interpreted it as leaving unaffected the practice of assessing yardage charges on all direct shipments.

The second reason advanced by Swift to the Commission to explain its change of view toward the Act was as follows:

> "Section 1 (6) of the Interstate Commerce Act, as it now exists, did not come into being until the amendment of February 28, 1920; and there was therefore no statutory duty placed upon the carrier to establish reasonable practices in connection with receiving and delivering of property." (Swift's brief, March 30, 1939, p. 153.)

On the contrary, Section 1 (6) was enacted in the Mann-Elkins Act of June 18, 1910. (36 Stat. 544.) The amendment of February 28, 1920 had no effect on this statutory duty of the carriers; it merely omitted two separate words ("and" and "such") and one phrase ("with reference to commerce between the States and with foreign countries"). (See Interstate Commerce Acts Annotated, Vol. 1, p. 633.) These were the sole changes in 1920. Both in 1910 and after the amendments of 1920, the section read as follows:

> "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * rates * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving * * * and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt * * * and delivery of property * * * upon just and reasonable terms * * * ."

The third reason stated by Swift was as follows:

> *"It was not until the 1920 amendment of Section 15 (1) of the Act that the Commission was given specific power to make an order concerning a regulation or practice."* (Swift's brief, March 30, 1939, p. 154; italics are Swift's.)

On the contrary, specific power to make an order concerning regulations or practices affecting rates was conferred by the

Hepburn Amendment of 1906. (See Interstate Commerce Acts Ann., Vol. 3, p. 1866.) The practice with regard to delivery at the Union Stock Yards affects rates; the present controversy is with respect to that practice in so far as it does affect rates. It is the yardage charges that are in dispute. But even this limitation on the power of the Commission to make an order concerning regulations or practices was removed by the Mann-Elkins Act in 1910. (Interstate Commerce Acts Ann., Vol. 3, p. 1866.)

Thus all three reasons given by Swift to the Commission to explain the belated character of its argument on the legality of the yardage charges under the Act were factually incorrect, and as shown above at page 69, the similar reason stated to this Court merely confirms the fact that the *Covington* case is not pertinent. Since each of the statutory powers of the Commission and duties of the carriers to which Swift has directed particular attention was enacted long before 1920, and since the *Covington* case, now relied on, was decided in 1891, prior to the time when Swift first became a partner in the assessment of these yardage charges, Swift's assertion that it delayed making protest against the imposition of the charges because of the absence of those portions of the statutes must be dismissed as an afterthought. The weakness of the explanation is further shown by the fact that even after the amendment of the Act in 1920, no protest was made or suit brought. Not until thirteen years later did Swift, for the first time in the long history of its operations at the Chicago Union Stock Yards, make any protest against the practice. The real reason why there was no protest in all the years before was that both before and after 1920 Swift as well as the other packers definitely and affirmatively accepted the established practice respecting yardage charges as valid and reasonable.

C. AS THIS COURT HAS JUST HELD, SECTION 1 (3) DOES NOT REQUIRE THAT SERVICES BE PROVIDED BY THE CARRIERS CONTRARY TO THE CONTRACT AND TO THE ESTABLISHED PRACTICE.

As this Court held in the *Armour* case[1] the words in Section 1 (3), "services in connection with * * * delivery," which Swift and Armour now say rendered the yardage charge on directs illegal, are meaningless without a determination of the administrative question as to when and where delivery takes place in accordance with the contract and the usage and practice. If delivery into the suitable pens is in full satisfaction of the contract, and if the Commission, on a record which supports the finding, decides that the long established usage and practice are not unreasonable, then we submit that there is nothing in Section 1 (3) to require that transportation shall include services beyond the unloading pens. Both those circumstances are present here.

The direct shipments move under the Uniform Live Stock Contract. By that contract of shipment, the parties agree that the carrier shall transport the shipments "*to its usual place of delivery at said destination.*" (Ex. 19.) The usual place of delivery of livestock consigned to the Union Stock Yards and indeed, the only delivery point that has ever existed at those yards, is the unloading pens. As was well known to Swift, the carriers have never contracted or held themselves out to provide any services beyond those pens and have never been paid for any such services. The practice approved by the Commission is the delivery practice for which the parties have contracted. This, we understand, is conceded by Swift. In other words, the contract has always provided that the "services in connection with the * * * delivery" of these shipments, as those words are used in Section 1 (3), shall terminate at the unloading pens.

The cases discussed at pages 49 to 64 above, establish the rule that the transportation services under Section 1 (3)

[1] "Neither *the statute* nor any applicable principle of governing law can be said to mark this boundary" of the common carrier's duty to transport. 312 U. S. 195, 200.

required of a carrier are such as are customary and reasonable. For example, in *Adams* v. *Mills*, *supra* p. 49, it was held that whether unloading was a service in connection with delivery which was required of the carriers was not a pure question of law to be determined by the Interstate Commerce Act or by the tariffs, but depended upon certain facts including the history of the yards, their relationship to the line-haul carriers, the history of the charge and the action of the parties in respect thereto. Here the Commission has reviewed these factors and many others and has concluded, on a record which supports the findings, that the usage and practice which has been affirmatively accepted as reasonable by Swift and the other packers ever since the Civil War, is not unreasonable. The very essence of the decision in the *Armour* case is that nothing in Section 1 (3) compelled the Commission to reach a contrary decision.

D. THE LEGISLATIVE HISTORY OF SECTION 15(5) OF THE INTERSTATE COMMERCE ACT AND OF SECTION 406 OF THE PACKERS AND STOCKYARDS ACT DEMONSTRATES THAT CONGRESS HAS RECOGNIZED THE USAGE AND PRACTICE BY WHICH TRANSPORTATION TERMINATES AT THE UNLOADING PENS.

In order to resolve by legislation the question whether the unloading was a part of the transportation service (*i.e.* the question then being litigated in *Adams* v. *Mills*, *supra*), Congress added the following provision to the Interstate Commerce Act in the Transportation Act of 1920:

> "Sec. 15(5). Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine

regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." (49 U.S.C. Sec. 15(5))

In the words of the Commission, this provision "differentiates between livestock and other carload freight with respect to the unloading service." (R. 49.) As to freight in general, and as to livestock at points other than public stockyards, the carrier normally has no duty to unload, whereas this section makes unloading the carrier's duty with respect to livestock delivered at public stockyards. Swift has attempted to distort this finding by representing that the Commission found that "as to livestock, Section 15(5) repealed Section 1(3) of the Interstate Commerce Act." (Brief, p. 12.) Of course, no such finding was made.

It was argued in the *Hygrade* case (295 U.S. 193, 195), and in some of the cases preceding that decision, that Section 15(5) extended the legal requirements of transportation of direct shipments to the boundaries of the stockyards. This Court rejected that argument in the *Hygrade* case as follows:

"Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301(b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." *Atchison, T. & S. F. Ry.* v. *United States*, 295 U.S. 193, 199-200 (1935).

In the light of the legislative history of Section 15(5), and of the Court's decision in the *Hygrade* case, Swift has conceded in this case that the section may not be interpreted as extending the transportation duties of the carriers to the streets.[1]

The day that Section 15(5) became effective, just as in all the period before and since that time, the Yard Company continued to assess yardage charges on all livestock received at its yards, including direct shipments. In 1921, for example, there were more than 1,100,000 head of direct shipments to packers (Ex. 38) and the yardage charge was paid on every animal. With this new legislation fresh in the minds of all interested parties, there was no protest from the packers or anyone else that the assessment of the yardage charge on direct shipments constituted a violation of that section. That fact is enough of itself to demonstrate that the packers did not construe the section as requiring a change in the yardage charge practice. Recognizing that its complaint finds no support in Section 15 (5), Swift has been forced to construe Section 1 (3) as having made the collection of the yardage charge on direct shipments illegal since 1906, and to attempt the untenable explanation considered above as to why Swift did not advance its present interpretation of Section 1 (3) until the last few years.

The legislative history of Section 15(5) confirms the understanding of all the parties that the obligations of the carriers end at the unloading pens. The origin of that section was described by the Commission in part as follows:

> "The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U.S. 397. For almost 50 years prior

[1] Swift's Brief before the I. C. C., March 30, 1939, p. 68, states: "The complaint does not allege any violation of Section 15(5). No evidence tending to show a violation of Section 15(5) was offered by complainant at the hearing."

to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[1] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. *The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge.* It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to Section 15, subsequently enacted.

"The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

'I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.*'[2] (Emphasis supplied.)

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[1] *United States* v. *Union Stock Yard & Transit Co., supra.*
[2] 59 Cong. Rec. 674.

"Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

'It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *.'[1] (Emphasis supplied.)

"Evidence of the intent of Section 15(5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. *No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.*" (R. 50–52.)

The producers never attempted by legislation, or otherwise, to alter the established practice regarding the assessment of yardage charges, either on their own shipments, on which they pay the yardage charge or on direct shipments on which the yardage is paid by the packers. Swift admitted this before the Commission and stated with regard to the yardage charge on direct shipments: "They [the producers] were not paying that charge * * *, they never have paid it, and they are not now paying it." (Swift's Brief, March 30, 1939, p. 65.) Although the producers were engaged both in the proceeding which culminated in *Adams* v. *Mills*, and in efforts before Congress which resulted in the enactment of Section 15(5), their interest was solely in the unloading services and charge, and they had no interest in and have never made any complaints as to the yard-

[1] 61 Cong. Rec. 1800.

age charges on direct shipments. Swift was a party to *Adams* v. *Mills*, and it, as a packer, was paying such yardage charges, but it neither argued to the Commission that there was anything illegal about them or suggested to Congress that they were objectionable. The purpose of the amendment was fulfilled when the carriers resumed and continued the former practice of absorbing the loading and unloading charge of the Stock Yards Company. No one intended that the amendment should deal with the yardage charges on direct shipments. In this connection the Commission stated:

> "The language of Section 15(5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.
>
> "*The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads.*" (R. 54)

The foregoing interpretation was confirmed by this Court in *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213 (1939). In that case the Court affirmed the Commission's decision that the loading and unloading services provided by the Yard Company for its loading and unloading charges on

file with the Commission, were transportation services and that the Yard Company was therefore subject to the Commission's jurisdiction with regard to those services. The Court referred to Section 406 of the Packers and Stockyards Act, 1921, which provides: "Nothing in this Chapter shall affect the power or the jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission," and stated:

> "This Court has since recognized that loading and unloading services such as are here involved are common carrier services placed under the authority of the Commission by the Interstate Commerce Act. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra; Denver Union Stock Yard Co.* v. *United States, supra,* 477. And unless the restriction of §406 of the Packers and Stockyards Act upon the authority of the Secretary of Agriculture in favor of that of the Commission refers to such services, the purpose of the section is not apparent. None other is suggested. See *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* 199." 308 U.S. at 221.

The Court thus pointedly contrasted the *unloading* services, jurisdiction over which is reserved to the Commission by Section 406 of the Packers and Stockyards Act, with the services and facilities in the Yard *after* the unloading. The page of the opinion in *Atchison T. & S. F. Ry. Co.* v *United States,* to which the Court specifically referred, contains the following statement:

> "Paragraph 5 of §15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, *it left undisturbed the Yards Company's practice of making a charge for livestock received.*" 295 U.S. at 199.

Moreover, the Court's opinion in *Union Stock Yard & Transit Co.* v. *United States,* regarding the fact that the reservation of

jurisdiction by Section 406 referred only to the loading and unloading facilities and services, continued in a footnote as follows:

> "If this were doubtful, doubt would be removed by the legislative history. S. 3944, 66th Congress, in providing a Federal Livestock Commission to regulate packers and stockyards did not contain such a saving clause. The House Committee on Agriculture proposed a substitute bill giving control of the stockyards to the Interstate Commerce Commission because 'the Commission already has control over transportation of cattle, which does not end until they are *unloaded* at the yards . . .' H. Rept. 1297, 66th Cong., 3rd Sess., p. 9." 308 U.S. at 222.

E. AFTER THE ENACTMENT OF SECTION 15(5) AND UNTIL 1933, IT WAS AT ALL TIMES THE POSITION OF THE PACKERS THAT THE YARD COMPANY'S CHARGE ON ALL DIRECT SHIPMENTS "RECEIVED" COVERED A STOCKYARD SERVICE AND NOT A TRANSPORTATION SERVICE.

The most positive confirmation of the packers' recognition of the legality of the yardage charges on direct shipments is found in the events following the enactment of Section 15(5). Reference has been made to the fact that in 1912 this Court required the Yard Company to file with the Commission a tariff covering all its charges for transportation service, and that after that tariff became effective, the Yard Company, as it had for almost fifty years before, continued to assess the yardage charge on all direct shipments as a distinct and separate charge for a stockyard service and in addition to the transportation charge. At no time did the appellant contend that the Yard Company's charge on all direct shipments "received" at the yard was for a transportation service which was or should have been embraced in the tariff which this Court had required the Yard Company to file with the Commission. In 1921, moreover, when the Packers and Stockyards Act was passed, requiring the filing with the Secretary of Agriculture of all tariffs for "stockyards" services, as distinguished from "transportation" services (7 U.S.

C. Sec. 201) the Yard Company filed a tariff with the Secretary covering its yardage charge on all animals "received," applying alike to direct shipments and all others. The packers continued paying that charge as they always had, and neither at that time nor at any time was that tariff assailed as covering a transportation service. Instead of protesting the application of that tariff charge to its direct shipments the packers paid the charge without complaint. They had not yet evolved the theory that the charges were illegal.

But Swift's and Armour's view of the legality of the charges during those years was not limited to mere acquiescence. Just as they had formerly insisted that they could bargain with the Stock Yards Company (never with the railroads) about those charges, so in 1927 they appeared before the Commission and successfully argued that Section 15(5) had not so changed the Interstate Commerce Act as to render illegal the yardage charges on direct shipments. The packers acquired control of the stockyards at many of the principal markets throughout the country, and they had caused those yards to assess yardage charges on all direct shipments received. In its report herein the Commission states:

> "The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of Section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co.* 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under Section 15(5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 per cent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges

were being assessed on direct shipments.[1] The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to." (R. 52)

* * * * *

"The first case, after the enactment of Section 15(5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens." (R. 53)

Both Swift and Armour seek to explain away the *Southwestern Horse & Mule* decision, although on mutually contradictory grounds. Swift says the horse dealers there (whose barns were located outside the stockyards) did not seek "a mere egress from the unloading platforms" but "were there requesting a complete stockyards service in addition to transportation." (Brief, p. 22.) It states further: "While some of the dicta in that decision may have been wrong, the decision was right on the facts." (Swift Appendix, p. 85.) Armour, on the other hand, makes no claim that there was a request for complete stockyards services, but says that the dealers were offered free egress by one route but preferred another. (Armour's Brief, p. 20.) It was Armour's counsel here who successfully argued

[1] The stockyards were those at Denver, Fort Worth, Kansas City, Milwaukee, Oklahoma City, St. Joseph, St. Louis, Sioux City, St. Paul, Omaha, Philadelphia and Brighton. In all except two of these yards the packers held more than a majority of the voting stock, and in those two (Omaha and Philadelphia) they held substantial interests (Ex. 73). In *Stafford* v. *Wallace* 258 U. S. 495,500, the Court, quoting from the "summary of report of the Federal Trade Commission on meat packing industry, July 3, 1918" stated: "Control of the stockyards comprehends * * * control of yardage services and charges * * *."

to the Commission on behalf of the Fort Worth Stockyards Company, which was controlled by Armour and Swift, that the yardage charge on the direct shipments was legal. (Armour's Brief, p. 19.)

Each of these two contradictory statements of the *Southwestern Horse & Mule* case is at variance with the facts. The opinion in that case states that approximately 30 per cent of the shipments were removed by the consignees directly from the unloading pens. (129 I. C. C. 730,734.) The description in the Commission's opinion is borne out by the record itself in that case. One of the complainants testified as follows:

> "*A.* We go to the chute and get the mules and drive them through the stockyards and out on the street and to our barn.
>
> *Q.* And for that passage through the stockyards, is that what you pay the 35 cents for?
>
> *A.* Yes, sir." (Record, p. 293, *Southwestern Horse & Mule Dealers Association* v. *A., T. & S. F. Ry. Co.* 129 I.C.C. 730.)[1]

On behalf of the packer-controlled Stockyards Company, Armour successfully argued to the Commission that transportation of the shipments terminated at the unloading pens and that the charges on all direct shipments received at the yard were legal. The explanation for the packers' present shift in the interpretation of the Act is not to be found in the Act, since the Act is, in this respect, unchanged since that time.

Not until 1933, 13 years after the enactment of Section 15 (5), 27 years after the enactment of Section 1 (3) and 42 years

[1]The record also contained the tariff which the packers caused the Fort Worth Stockyards Co. to file immediately before the hearing. The tariff provided for a yardage charge on all horses and mules transferred by the owner from the unloading pens to his barns, without regard to the route of egress. (Ex. 51 of Record in *Southwestern* case.)

after the *Covington* case, did Swift or Armour raise any objection to the established delivery practice at Chicago. They showed their understanding of the meaning of the Act not only by paying yardage charges to the Stock Yards Company on every animal received at the public stockyards but also by their insistence from the early nineties down to 1919 that the matter of yardage charges for the removal of direct shipments was a question for bargaining between the packers and the Stock Yards Company, not a transportation matter for the railroads. They caused the important stockyards companies which they controlled to assess yardage charges on all direct shipments received at those stockyards. On behalf of one of those companies, counsel for Armour successfully argued to the Commission that a yardage charge covering egress of direct shipments from the unloading pens to the street was valid under the Act, and that transportation ended at the unloading pens.

This, we submit, is a remarkable background for the packers' present argument that Section 1 (3), enacted in 1906, compels the Commission to hold that transportation of the packers' direct shipments extends to the streets and that the customary yardage charge, included since 1921 in the tariff for stockyards services filed with the Secretary of Agriculture, is, instead, a transportation charge and is illegal. We submit that the Commission, in accordance with the rule stated in *Adams* v. *Mills*, *supra*, p. 50, properly gave weight to the fact that all parties have for many years been in agreement that the established usage and practice at Chicago was reasonable and lawful.[1]

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[1] In *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 223, the Court held that evidence of the situation at other stockyards was irrelevant and sustained the Commission's exclusion of such evidence. In this case Swift claims that the Commission erred in failing to find that at a minority of 13 out of the 58 yards as to which evidence was available at the hearings, (R. 394) no charges were made on direct ship-

F. THE SECRETARY OF AGRICULTURE HAS ASSERTED AND EXERCISED JURISDICTION OVER THESE YARDAGE CHARGES ON DIRECT SHIPMENTS AND IF THE CHARGES ARE UNREASONABLE THE PACKERS HAVE A COMPLETE REMEDY BY COMPLAINT TO THE SECRETARY.

In Section 301 of the Packers and Stockyards Act, 1921, adopted just one year after the addition of Section 15 (5) to the Interstate Commerce Act, there is the following provision:

> "The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." (7 U. S. C. Sec. 201 (b))

It was this section that the Court referred to in the *Hygrade* case, saying:

> "Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received.* The Packers and Stockyards

---

ments in addition to the line-haul rate. (Brief, p. 83) In addition to being irrelevant, Swift's assertion is inaccurate. The tariffs show that at one of the thirteen yards there is no exemption from yardage charges for directs. (Ex. 17) At others the exemption applies only on certain kinds of animals (Ex. 12, Supp. 6), or is conditioned upon the consignee's relieving the carrier of the duty of unloading (Ex. 15), or is given only if the consignee, unlike Swift, has "no direct rail facilities" (Ex. 10). At five of the remaining yards there is collected by the stockyards companies an insurance charge, filed with the Secretary on the theory that transportation terminates and the Secretary's jurisdiction attaches after the unloading. (Exs. 5, 8, 9, 13, 16) At only four of the thirteen yards is Swift's statement correct, and there is no proof of any similarity of these yards with Chicago regarding usage and practice, physical conditions, etc.

Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock. Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission." *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. at 199.

In construing the Packers and Stockyards Act, the Secretary has taken the position that these yardage charges on direct shipments at Chicago, and at several other important stockyards, are within his jurisdiction. Following extensive previous investigations into the rates and practices of The Union Stock Yard and Transit Co., the Secretary in 1935, by a formal order, instituted a proceeding for the purpose of determining the lawfulness of all the Yard Company's rates and charges contained in its tariff on file with the Secretary, including the yardage charges on direct shipments which are here being litigated. (Ex. 37) Extended hearings were held, after which, in February, 1938, the Secretary's Examiner filed a proposed report and order. The packers petitioned to intervene in that case after the Examiner's report was issued, and it appears from that petition that the validity of the yardage charges on all direct shipments was upheld in the report. (Ex. 63, pp. 7, 8) After this thorough investigation of the yardage charges, the Secretary terminated the proceeding by accepting a new tariff of the Yard Company, Tariff No. 11, which changed certain charges but which retained the yardage on all direct shipments. (Exs. 64, 67) The Secretary has thus asserted jurisdiction over the very charges that are at issue in this case, and the packers did not oppose the exercise of that jurisdiction.

The Commission made the following finding as to the Secretary's assumption of jurisdiction over yardage charges on direct shipments at other stockyards:

"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra; Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary." (R. 53, 54)

Swift seeks to distinguish these decisions of the Secretary by alleging that the charges fixed by the Secretary at Denver, Omaha, and St. Joseph were "charges covering a complete stockyard service of holding, feeding, watering, placing in commission men's pens, etc." and that the removal of direct shipments was not involved. (Brief, p. 38) In so arguing, Swift is in error on the facts, as will appear by reference to those decisions.

The rate schedule ordered into effect by the Secretary in *Secretary of Agriculture* v. *Denver Union Stock Yard Co.*, B. A. I. Dkt. No. 450, provided expressly that "yardage will be charged as shown below: * * * (3) on livestock consigned direct to packers and slaughterers." (Ex. 41, p. 79) Those charges, like the charges at Chicago, cover every animal received at the yards without exception. Swift says that a "complete yardage service" was given on each animal and that this was shown because "the Secretary prescribed the same yardage rates" on market stock and on direct shipments. (Swift's Appendix, p. 80) The Secretary's report is explicitly to the contrary. The report states that the only direct shipments at Denver were hogs. (Ex. 41, pp. 69–70, 77) The tariff prescribed by the Secretary set a yardage charge of six cents per head on direct ship-

ments of hogs, as compared with twelve cents per head on the hogs consigned to the market. (Ex. 41, p. 79) These facts also appear in the opinion of this Court in which the Secretary's order was sustained. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 474 (1938). It may be mentioned that even if the facts had been as Swift incorrectly states them, *i.e.*, if the charges on directs and market stock had been uniform, the tariff of the Denver Union Stock Yard Company would have been identical with that in effect at Chicago.

In *Secretary of Agriculture* v. *Union Stock Yards Co. of Omaha*, B. A. I. Dkt. No. 344, the Secretary prescribed yardage charges on direct shipments in the same way as at Denver, setting the charges at half the amount of the yardage charges on the market livestock. (Ex. 42, last page, order of Oct. 6, 1937) Swift is in error in stating to the Court that the yardage charges on these two kinds of shipments were identical. (Swift's Appendix, p. 82) It may also be noted that the portion of the Secretary's opinion which is quoted by Swift shows on its face that it refers to livestock which has been purchased on the market at the stockyards, and not to direct shipments.

Referring to the third decision of the Secretary (*Secretary of Agriculture* v. *St. Joseph Stock Yards Co.*, B. A. I. Dkt. No. 298, Ex. 43 in this record), Swift says that the decision "makes no mention anywhere of direct shipments to packers." (Swift's Appendix, p. 79) Contrary to Swift's statement, the decision reads as follows:

> "22. Some livestock comes to the stockyard consigned directly to packers and other users under circumstances such that it is not sold in the stockyard. The yardage charges detailed above are assessed against this livestock and imposed upon the person who causes it to come to the stockyard.
>
> 23. It is evident that the theory upon which the schedule of rates and charges is constructed is that whosoever causes

livestock to come to the stockyard shall pay yardage charges, which are in effect an entrance fee * * *." (Ex. 43, p. 9)

Moreover, the Secretary's order of April 13, 1938, expressly specified yardage on livestock "consigned direct to packers" at charges varying from one-third to one-half the yardage charges on the market livestock. (Ex. 43, last page) Swift's characterization of this decision of the Secretary as containing no reference to direct shipments, and its comments about the other decisions in which the Secretary has taken jurisdiction of the yardage charges on direct shipments are complete departures from the facts. If Swift and Armour believe that the yardage charges on direct shipments which are contained in the Yard Company's tariff filed with the Secretary are unreasonably high, and can prove their case, the Secretary has jurisdiction to order a reduction of those charges, and the cases just discussed show that he stands ready to exercise it.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION OF APPELLANTS FOR REHEARING.

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May 25, 1942.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



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PETITION OF APPELLANTS FOR REHEARING.

Appellants herein respectfully request rehearing in the above entitled case.

Point I.

The Majority Erred Factually in Its Statement of the Issue Submitted by Appellants, and as a Result Failed to State or Decide the Issue Submitted by Appellants.

To state bluntly the ground upon which rehearing is asked, it is that the majority decided this case upon an issue *not* presented to it, and failed to consider and decide the issue which was presented to it. At pages 2 and 3 of our brief in this court appellants stated as follows the issue to be decided:

"The Question to Be Decided.

"May appellants lawfully demand the right to take possession of their direct shipments of live stock at the unloading pens of the railroads' only live stock terminal in Chicago and have egress thence immediately to a public street, upon payment to the railroads of their published transportation rates (*or such rates plus a reasonable fee for egress*) without the payment of additional charges, known as yardage charges, assessed by the railroad defendants' agent, The Union Stock Yard and Transit Company of Chicago, for a complete stock yard service (not a transportation service) furnished under the provisions of the *Packers and Stockyards Act, 1921*?"

The majority of the court disregarded that portion of the foregoing statement appearing in italics in the above quotation, and stated that appellants were demanding an *absolute right as a matter of law* to remove their shipments without payment other than the railroad rate. It is believed that this error of fact in the statement of the issue presented so permeated the remainder of the decision as to lead to the conclusion that the decision would have been different but for this error on the part of the majority.

That this error was made by the majority in its conception of the issue involved is readily demonstrable from the opinion. Thus in the last paragraph on page 3 (pamphlet copy) of the decision of May 4, 1942, appears the following:

"The many assignments of error may be grouped under three inquiries: (1) Do the packers have *an absolute right as a matter of law* to take their direct shipments of livestock from the unloading pens free from yardage charges?" (Emphasis ours.)

In the second paragraph on page 4 (pamphlet copy) of the decision appears the following:

"The packers' contention that they are entitled *as a matter of absolute right* to delivery of their livestock from the unloading pens without payment of yardage

charges is based upon the decision of this Court in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, and the subsequently enacted § 1 (3) of the Interstate Commerce Act." (Emphasis ours.)

Upon this erroneous conception of the issue, the argument in this case apparently seemed to the majority nothing more than an effort to reargue *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771.

It is respectfully submitted that the majority failed to state the issue presented for decision in that it completely disregarded the contention that appellants were entitled to egress at the railroad rate *plus a reasonable fee for egress*, to be fixed by the Commission, if not entitled to egress at the flat railroad rate.

This alleged error in the statement that appellants were demanding an *absolute legal right* is apparent from the assignment of errors and otherwise. Assignment of error No. 13 (R. p. 104) reads as follows:

> "No. 13. Because the court erred in failing to find that, if the present railroad rates to the railroad station at the Union Stock Yards do not afford compensation to the railroads for egress from the pens, *the Interstate Commerce Commission may and should prescribe a reasonable additional charge for such egress.*" (Emphasis ours.)

This assignment of error was incorporated in point II of our "Statement of Points to Be Relied Upon" on this appeal (R. pp. 787-788). This same point is quoted verbatim at page 31 of our brief before this court and reads as follows:

> "The District Court erred in failing to find that the charges here assailed, in so far as they were assessed for the use of stock yard facilities in effecting delivery of interstate shipments of live stock, were charges for transportation within the meaning of that term as defined in section 1 (3) of the Interstate Commerce Act; that the Interstate Commerce Commission has

jurisdiction to pass upon the legality and reasonableness of such charges; *that, if the present railroad rates to the railroad defendants' station at the Union Stock Yards do not afford compensation to the railroads for egress from the pens to a public street, the Commission may and should prescribe a reasonable additional charge for such egress;* and that, if use of the terminal facilities of the Union Stock Yards for egress from unloading pens to a public street is a part of transportation and if this use is a service for which reasonable compensation is justified, this charge, like the unloading charge, is a part of the reasonable transportation rate, determination of which is committed to the jurisdiction of the Interstate Commerce Commission, as specified in assignments of error Nos. 13, 14 and 15." (Emphasis ours.)

The point is argued at pages 31-35 of our brief, two paragraphs of that argument (appearing at page 34 of our brief) being as follows:

"If, however, the rates are not now sufficiently high to cover such additional cost as may be incurred by the railroad defendants in providing mere egress, the Commission should have held this charge to be a transportation charge, as it did in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and should have determined *what would be a proper additional charge, if any, for egress.*

"The Commission was in fact urged by appellants to do this during the course of the hearing. The record, at pages 219, 220, 221, and 369, shows this action on the part of appellants. The Commission may not lawfully avoid the duty to make a proper readjustment of the line haul rates on *directs*, to cover any additional expense incurred by the line haul carriers, if appellants, as a matter of law, are entitled to egress."

That this point escaped the attention of the majority is also apparent by reference to the last sentence in the first paragraph on page 11 of the decision (pamphlet copy), where the court states:

"The Packers and Stockyards Act having made

private arrangements of this kind unlawful, the packers now contend that *the carriers must protect them against yardage charges on their direct shipments.*" (Emphasis ours.)

To the contrary, the following appears at page 3 of our brief in this court:

> "The Egress Sought by Appellants Would Not Impose Any Additional Costs Upon the Railroad Defendants.
>
> "The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness *to pay whatever the Commission might consider reasonable for egress,* in addition to the line haul rate to the unloading pens, if in fact additional expense should be incurred by the railroads by reason of any payment to their agent, the stock yard company, for use of its alleys for a short distance from the railroad unloading pens to public streets, alleys, or ways."

That the issue was so understood by the railroad interveners is established by reference to pages 9 and 10 of their brief in this court, from which we quote as follows (pp. 9-10):

> "The unwillingness of the packers to join issue with the Yard Company respecting a charge paid to the Yard Company for services performed by the Yard Company is made more marked by Swift's admission that it is not paying, and has never paid the trunk lines for the services in question. The appellant states:
>
> > 'The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness to pay whatever the Commission might consider reasonable for egress, in addition to the line-haul rate to the unloading pens. * * *' (Swift's brief, p. 3.)
>
> "Swift's change in position, to which it here refers, *occurred during the hearings before the Commission,*

after it was proved beyond question, as the Commission has now found, that the transportation rates which the Commission had itself prescribed on live stock consigned to the public stockyards at Chicago were not intended to, and do not, compensate the carriers for any services or facilities beyond the unloading pens." (Emphasis ours.)

The proposition we are now urging was also made apparent and the fact that appellants were not contending that they are "entitled *as a matter of absolute right* to delivery of their livestock from the unloading pens" without payment of charges beyond the railroad rates, are definitely indicated at pages 4 and 5 of our brief in this court under the caption "The Relief Sought". We there stated:

> "The prayer is not *for a final adjudication* of the rights of the parties, but remand of the complaint to the Commission for exercise of the jurisdiction which the Commission has disclaimed. The relief sought is that indicated by this court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 83 L. ed. 1147, where the court said (at page 136):
>
> > "* * * if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles.'"

As we have heretofore pointed out, at page 34 of our brief and at other points, we distinctly proposed that, if the present railroad rates are not sufficiently high to include what the railroads might be required to pay the stock yards for egress across the property of their agent, the stock yards, the Commission ought to fix a reasonable charge for such egress. The case as presented to this court brought us squarely within the language of the

majority at page 7 of the decision (pamphlet copy) where the second paragraph concludes as follows:

> "The propriety of the yardage charges in the present case was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law."

That sentence states precisely our contention before the Commission, before the District Court, and in this court. That this was our contention shows the error of the statement by the majority to the effect that we are seeking to have the carriers protect us "against yardage charges on direct shipments".

In the majority opinion (pamphlet copy, last paragraph, p. 7) it is stated:

> "Their patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they entitled to facilities or treatment that will ignore the existence of other interests."

Appellants did not indulge the assumption that the Interstate Commerce Commission would in any respect ignore the existence of other interests, including the interests all parties which might be affected.

The court will doubtless agree that the Interstate Commerce Commission never decided that the *quantum* of the yardage charges is appropriate for mere egress, or as compensation for the use of alleyways from the unloading pens to street exists. As we have pointed out in our brief in this court at page 9, the yardage charges cover in a single charge complete stock yard services (undivided as to specific services) which include (1) feeding of live stock; (2) watering the live stock; (3) holding the live stock in holding pens; (4) moving the live stock to pens assigned to commission men; (5) furnishing to the commission men pens in which the live stock may be held for an unlimited time; (6) movement of the live stock after sale to pens of a

purchaser or to outbound cars; and (7) weighing the live stock for the purpose of purchase and sale.

It was there pointed out that these yardage charges range from $11.25 per car on cattle to $23.30 per car on sheep. The Interstate Commerce Commission never held that the *quantum* of these charges was correct for the service here involved. The entire opinion of the Interstate Commerce Commission was of an argumentative nature leading up to the conclusion stated by it at pages 196-197 of its decision (R. p. 55) as follows:

> "We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, *are not subject to our jurisdiction.*"

It was never asserted by appellants that the Commission had or has jurisdiction over *yardage charges for stock yard services.* Those charges and services are set up and described in exhibit 3 (R. p. 154) which is the tariff of the Union Stock Yard and Transit Company filed with the Secretary of Agriculture and in effect at the commencement of the hearing before the Interstate Commerce Commission.

Certainly it cannot be assumed that the Interstate Commerce Commission, if it had exercised its jurisdiction to fix an appropriate charge for something included within transportation service, would have overlooked the interests of any parties, acted in any such manner as to discriminate in favor of these appellants, or have otherwise failed to perform its full duty in the premises.

It is respectfully submitted that the entire decision of the majority is permeated with and strongly affected by its error in its understanding of the issue submitted to it for

decision, and that the decision would probably have been otherwise if the issue submitted to the court had been understood and correctly stated.

The Prior Administrative Rulings of the Commission Are Not Considered in the Majority Opinion.

Appellants did not take their case to the Commission because they preferred the Interstate Commerce Commission as a tribunal to the Secretary of Agriculture. They took their case to the Commission because of the administrative rulings of the Commission, not overruled at the time this complaint was filed, to the effect that the Commission had and has jurisdiction of the charges and services involved in this controversy.

At pages 13-23 of the appendix to our brief in this court we have quoted in full the decision of the Commission in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. This was an unqualified declaration by the Commission of its power and authority to deal with the subject matter of the Swift complaint in this case. The Commission there held (p. 22 of appendix to appellants' brief):

> "We find that the charges herein assailed in so far as they were assessed for the use the stockyards facilities in effecting delivery of interstate shipments *were charges for transportation within the meaning of that term as defined in section 1 of the interstate commerce act*, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act." (Emphasis ours.)

The Commission's jurisdiction of the exact subject matter here involved was again asserted by it in *E. Kahn's Sons Co.* v. *Baltimore & Ohio R. Co.*, 192 I. C. C. 705, and *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553 (see p. 24 of appellants' brief in this court).

It is true that an administrative ruling is not controlling if plainly contrary to law. On the other hand, it is also familiar doctrine that repeated administrative rulings are entitled to substantial weight and will be sustained unless obviously in error. These prior administrative rulings of the Commission are not mentioned by the majority. But certainly the appellants had no guide to follow other than these rulings of the Commission in attempting to bring their complaint before the appropriate administrative tribunal.

By Its Decision the Majority Gives Country-Wide Application to a Certain Statutory Construction Based Largely Upon a History of Facts Entirely Local to Chicago.

In its present decision the majority holds (contrary to prior decisions of this court and the former administrative decisions of the Commission) that section 15 (5) of the Interstate Commerce Act (enacted in 1920) repealed (as to delivery of live stock at public stock yards) the provisions of section 1 (3) which had been in effect since 1906. If the general ruling upon the law is correct, it applies to *every delivery* at *every public stock yards throughout the United States*, but it is based largely upon and apparently controlled by facts wholly local to the contractual and other relations between certain packers and the stock yard company at Chicago, as set forth in section II of this court's decision. This statutory construction would necessarily lead to changes in rates and charges at other cities and at other stock yards where none of the historical facts recited as to Chicago exist.

It has been repeatedly held by the Commission and by this court (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186) that, if a carrier performs a service in excess of its statutory duty, it affords a rebate to the shipper or consignee for whom such service is performed. As pointed out at page 61 of our brief in this

court, egress without an addition to the line haul rate is permitted at the following stock yards, all of which are served by one or more of the railroad interveners in the present case:

Union Stock Yards Company of Baltimore, Md.
Buffalo Stock Yards, East Buffalo, N. Y.
Cincinnati Union Stock Yards, Cincinnati, Ohio
Cleveland Union Stock Yards, Cleveland, Ohio
Detroit Stock Yards, Detroit, Mich.
Indianapolis Stock Yards, Indianapolis, Ind.
Los Angeles Union Stock Yards Company, Los Angeles, Calif.
Bourbon Stock Yards, Louisville, Ky.
Muncie National Stock Yards, Muncie, Ind.
West Philadelphia Stock Yards Company, Philadelphia, Pa.
Pittsburgh Joint Stock Yards, Pittsburgh, Pa.
Wichita Union Stock Yards Company, Wichita, Kans.

This fact is not mentioned in the majority opinion.

We also pointed out at page 61 of our brief in this court that the recent decision of the Commission in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (decided April 7, 1941), shows that the same condition exists at certain stock yards not covered by the evidence in this proceeding. The Commission there points out that the Jersey City Stock Yards Company operates a *public* stock yard in Jersey City, N. J., and states at page 259:

> "The stockyards company also notifies consignees of arrival of the shipments, preserves the identity of each consignment, *delivers stock to consignee* or on floating equipment, obtains receipts therefor, collects transportation charges, handles loss and damage claims, assumes all responsibility therefor, weighs stock if requested, and performs all clerical work in connection with such services. It also orders cars, checks weights, routes shipments, and prepares freight bills on prepaid shipments. *For these services the railroads pay the stockyard company $2.75 per car,*

except on outbound shipments. This charge is published in tariffs on file with us." (Emphasis ours.)

The same decision of the Commission shows that a similar practice obtains in connection with the West Philadelphia Stock Yard Company which operates the only public stock yards at Philadelphia, Pa. (p. 250) and the Union Stock Yard & Market Company, Inc., which operates the only public stock yards in New York, N. Y. (p. 268).

If the Commission and the majority are correct in construing section 15 (5) as modifying and overruling section 1 (3), it follows that the carriers will have to eliminate the provision for egress now made at these other public stock yards and that an additional and separate charge will have to be made for such services. Nevertheless the Commission has assumed jurisdiction over the exact charges and services so involved.

In connection with Jersey City, it will be noted that the Commission exercised its jurisdiction and failed to express any disapproval of a provision by which the railroads pay the stock yards company $2.75 per car for *delivering live stock to the consignee* and certain other incidental services. This provision is stated by the Commission to be in a tariff filed with the Commission, and it cannot be doubted that it is subject to the Commission's jurisdiction.

Within the sound discretion of the Commission the history at Chicago might have justified a specific conclusion as to that point, whereas the history at another point might have justified a different conclusion. But under the statutory construction adopted by the court, the result must be the same at every point in the United States, regardless of what the historical background may be and regardless of whether the history of the practices at such point may or may not justify provision by the carrier for egress

at the line haul rate or at the line haul rate plus some reasonable charge for egress.

Indeed, at pages 10 and 11 of our brief in this court, we called attention to the fact that in the documents transmitted to this court and marked Exhibit "B," it is indicated that there is now pending before the Commission and undecided a proceeding known on its docket as No. 28400, *Delivery of Livestock Shipments at Cleveland, Ohio.* Appellant Swift and Company is a party to that proceeding, and there is no history of any transactions between the packers and the stockyards such as the court finds to have existed at Chicago. Nevertheless under this statutory construction it will be necessary to pay a stock yard charge in order to obtain delivery of live stock, although none has heretofore been made at that point.

Point II.

The Majority Erred, to the Prejudice of Appellants, in Its Factual Statement Concerning the 1892 Contract.

The majority has pointed out two remaining remedies of which appellants may still avail themselves.

(1) They may abandon all use of the public stock yards and demand "an increase in other facilities" at other available points of delivery in Chicago. The court carefully stated that the present case "has not been considered in that light", *i. e.*, as foreclosing appellants' right to relief from such source.

(2) They may continue the present use of the public stock yards as a delivery point and proceed against the stock yard company before the Secretary of Argiculture for an adjustment of the charge now being made by the stock yard company.

By an inaccurate factual statement the court has gravely affected, if not entirely foreclosed, those remedies. The erroneous statement refers to contractual rights alleged to have been created in 1892 between the packers and the stock yard company, and reads as follows (pamphlet copy, p. 10):

> "This agreement expired in 1907, *except for the covenant by the packers not to use any other stock yards for the receipt of their livestock so long as the Yards Company maintained its business in Chicago.*" (Emphasis ours.)

The majority erred in this statement.

The contract referred to was before the court *in toto* (appendix to appellants' brief, pp. 101-114). Its plain language refutes the majority's statement. Here is the *only clause in the contract* bearing on the subject matter:

> "Fourth:—The parties of the second part further covenant and agree that *during the period of fifteen years* from the first day of July, 1891 * * * they * * * will continue their several businesses and slaughtering * * * establishments at Packingtown * * * and guarantee that any and all cattle and live-stock slaughtered by them * * * on their said premises or within two hundred miles of the City of Chicago during such period" (*i. e., fifteen years*) "shall pass through and use the said yards, and pay the usual yardage and charges therefor." (Emphasis ours. P. 108, appendix to appellants' brief.)

In plain English language, the packers' "covenant" "not to use any other stock yards for the receipt of their livestock" *expired in 1906* and did *not* continue "so long as the Yards Company maintained its business" as the majority has asserted.

The effect of this erroneous statement upon the remedies of the packers is obvious. If we approach the railroads for enlarged delivering facilities at their team tracks, is it not a perfect answer for them to say:

"We shall not construct them. You could not use

them anyway. The Supreme Court of the United States has held that you are forever bound by contract to use the pens of the Yard Company."

Suppose we appeal to the Interstate Commerce Commission or to the courts. Would not either tribunal feel bound to adopt the Supreme Court's interpretation of the contract of 1892 and hold, *despite the clear language of the contract*, that the packers were so bound to the stock yard company?

Suppose we adopt the other remedy and proceed before the Secretary of Agriculture. With this erroneous statement facing us, we cannot appear before the Secretary as a customer of the stock yard company who, if his charge be too high, will withdraw his patronage. The Secretary must naturally assume that, regardless of the measure of the charge he fixes, we must continue our patronage of the stock yard company, for this court, with the contract before it, has so interpreted it.

What the majority has apparently done is to follow the Commission's erroneous interpretation of the contract rather than refer to the language of the contract itself. There *is* in that contract a covenant seeming to bind the packers in perpetuity. It is found in the eighth paragraph of the contract (p. 110, appendix to appellants' brief). But that provision has *nothing to do* with the use of the stock yard company's property or the payment of yardage charges. By that covenant the packers agreed not to "establish or carry on, directly or indirectly, or be * * * interested in any manner * * * in any stock yards in said city for the receipt and use of their own live stock".

It is a far different thing to say "I forever agree *not* to use *my own* stock yards" than it is to say "I forever agree to use *your* stock yards". The majority has done just what the Commission did. It has applied the perpetuity of paragraph 8 of the contract to an obligation created by

paragraph 4, which obligation was *on its face limited to fifteen years' duration.*

We respectfully request that the court reconsider the erroneous statement above referred to and correct the same to correspond to the facts, making the sentence read:

> "The agreement expired in 1907, save for the covenant of the packers *not to establish any stock yards of their own* in Chicago, for the receipt of their own livestock" or
>
> "The agreement of the packers to use only the yard facilities for all animals slaughtered within 200 miles of Chicago expired in 1907."

Either such statement will be correct. The erroneous factual statement must seriously jeopardize our exercise of either remaining remedy pointed out by the court.

Conclusion.

Appellants respectfully submit the following points in support of their petition for rehearing:

(1) The case was decided by the majority upon the erroneous theory that appellants were asserting "an absolute right as a matter of law" to take their direct shipments from the railroad unloading pens free from any charge other than the railroad rate to such pens.

(2) This statement of the issue to be decided is not in accord with the record before the Commission, or in the District Court; and is contrary to appellants' assignment of errors and statement of points relied upon.

(3) This error so permeates the majority decision as to color its entire content and lead to erroneous conclusions.

(4) Upon this erroneous theory the majority treats the case as if appellants were merely seeking an oppor-

tunity to reargue *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771. The statement by the majority of the issue to be decided is exactly the sharply limited one in the *Armour case*. Appellants were in fact seeking to have the court direct the Commission to exercise the jurisdiction which it denied and reach such conclusion as might be warranted upon the facts "within the framework of its own discretionary authority on the indicated correct principles".

(5) The majority erroneously gave no weight to the prior administrative rulings of the Commission concerning the subject matter here involved.

(6) The majority created a country-wide application of a statutory construction based upon a history of facts local to Chicago and not existing at other public stock yards.

(7) The majority erred, to the prejudice of appellants, in its construction of the 1892 contract.

For the reasons herein stated, appellants respectfully request rehearing of this case.

EDWARD B. KIXMILLER,
ROSS DEAN RYNDER,
Counsel for Appellants, Swift and Company and Omaha Packing Company.
PAUL E. BLANCHARD,
Counsel for Intervener, Armour and Company.

Chicago, Illinois,
May 25, 1942.

Certificate of Counsel.

The undersigned counsel for appellants and intervener hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD B. KIXMILLER,
ROSS DEAN RYNDER,
Counsel for Appellants, Swift and Company and Omaha Packing Company.
PAUL E. BLANCHARD,
Counsel for Intervener, Armour and Company.

p. 10.

SUPREME COURT OF THE UNITED STATES.

No. 595.—October Term, 1941.

Swift & Company and Omaha Packing Company, Appellants, *vs.* The United States of America and Interstate Commerce Commission, and others.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 4, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

Swift & Company and Omaha Packing Company, its wholly-owned subsidiary, filed with the Interstate Commerce Commission a complaint against the common carriers by railroad which served the Chicago Union Stock Yards, operated by the Union Stock Yard & Transit Company.[1] They were later joined by Armour & Company, as intervenor to constitute the interest referred to herein as the packers. Although Armour sought no relief, it was allowed to intervene because it was at the time litigating in the courts a similar complaint, which was later passed on by this Court in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. The complaint in this case concerned practices of the Union Stock Yard & Transit Company and charges collected by it from the packers, but the Yard Company was not a party to the proceedings. The packers sought a revision of the Yard Company's practices, which they said were part of the carrier-shipper relation, through the exercise of the Interstate Commerce Commission's jurisdiction over the railroads and over transportation.

The complaint charged that the packers shipped over lines of defendant carriers from various points of origin throughout the United States to Chicago, Illinois, what are known as "direct shipments" of livestock. "Direct shipments" refers to livestock consigned directly to a packer at the Union Stock Yards, as dis-

[1] Other phases of the general problem of the present case have been considered in Adams v. Mills, 286 U. S. 397; Atchison Ry. Co. v. United States, 295 U. S. 193; Union Stock Yard Co. v. United States, 308 U. S. 213; Armour & Co. v. Alton R. Co., 312 U. S. 195.

tinguished from a shipment consigned to a commission merchant at the Stock Yards for sale.[2] Direct shipments are generally of livestock which has been purchased by the packer or its buyers at country points or at markets other than Chicago. On arrival the cars containing the livestock are placed at unloading or chute pens of the Yard Company by the railroad employees and the stock is then unloaded and placed in the pens by employees of the Yard Company. For this unloading service the Yard Company is paid at published tariff rates[3] by the railroads, which absorb the charge out of their line-haul rates.

The packers desire immediately to take their consignments from these unloading pens and insist that they desire no further services and, of course, desire to incur no further charges.

The Yard Company, however, under tariffs filed with the Secretary of Agriculture pursuant to the Packers and Stockyards Act[1] imposes upon the packers a schedule of charges known as yardage charges, which vary from ten cents to forty-five cents per head of stock. The packers say that they desire none of the services, such as weighing, watering, feeding, or holding, which yardage charges compensate, and desire only to move their stock immediately from the unloading pens to the public streets without payment of the yardage charges. Contending that it is their legal right so to obtain delivery, the packers made sufficient demand upon the Yard Company and upon the railroad companies for immediate and free delivery of their stock from the unloading pens. This was refused, and yardage charges have been paid to the Yard Company under protest. The packers demanded from the Commission relief by way of reparation and asked the Commission to establish rules and practices under which they may obtain delivery to

[2] The Commission found from an analysis of the billing of 3,061 cars unloaded at the Union Stock Yards from January 1935 to March 1938, that 84.4% were consigned to the Stock Yards, and the remaining 15.6% were delivered to the Stock Yards although delivery at that point was not specified in the livestock contracts. "Under the terms of the contract, complainant could have required delivery of the 15.6 percent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards." 238 I. C. C. 179, 189. They were therefore included in "direct shipments."

[3] Under tariffs filed with the Interstate Commerce Commission by the Yard Company the railroads pay to the Yard Company $1.25 per single-deck car and $1.50 per double-deck car for services rendered as their agent in unloading the stock.

[1] Act of August 15, 1921, 42 Stat. 159, 7 U. S. C. § 181 *et seq.*

themselves by the railroads of direct shipments at the Union Stock Yards in convenient, safe, and suitable pens, with egress for the immediate removal of the livestock to the nearest public street, by a way to be designated by the railroads, without the payment of any yardage charges to the Union Stock Yards & Transit Company, and without the payment of any charges other than the line-haul transportation charges of the railroads.

The Commission after hearings denied the packers relief for reasons later to be considered. It found that the delivery of stock consigned by the packers to themselves at the Stock Yards into the Yard Company's pens without affording free egress for the shipments is not an unreasonable practice on the part of the carriers and that the yardage charges thereafter assessed by the Union Stockyards & Transit Company are not subject to the Commission's jurisdiction. 238 I. C. C. 179.

Appellants Swift and Omaha then brought suit in a District Court of three judges for a decree permanently suspending and annulling the order of the Commission and for a remand of the complaint for decision in accordance with principles of law to be determined by the court. Appellant Armour intervened and participated in the trial. The railroads which had been named as defendants before the Commission also intervened, as defendants in the District Court. After hearing, the District Court held without opinion that the Commission's findings were properly supported by evidence; that the findings made by the Commission were adequate to support its conclusion; that the practices complained of were not unreasonable; and that the Commission did not have jurisdiction of the yardage charges. It dismissed the packers' complaint, and appeal was taken to this Court.[5]

The many assignments of error may be grouped under three inquiries: (1) Do the packers have an absolute right as a matter of law to take their direct shipments of livestock from the unloading pens free from yardage charges? (2) If there is no such absolute right, was the Commission in error in considering the history of dealings between packers and the Yard Company together with other facts bearing on the reasonableness of the carriers' method of delivery at the Stock Yards? (3) If the practice as to delivery was

[5] §§ 210 and 238(4) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. §§ 47a, 345.

correctly held a reasonable method of terminating the carriers' obligation to furnish transportation, did the Commission have jurisdiction in a proceeding against the railroad companies to inquire into or prescribe the yardage charges complained of?

I.

The packers' contention that they are entitled as a matter of absolute right to delivery of their livestock from the unloading pens without payment of yardage charges is based upon the decision of this Court in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, and the subsequently enacted § 1(3) of the Interstate Commerce Act.

In the *Covington* case, decided on facts antedating the Interstate Commerce Act, this Court said that "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession." 139 U. S. at 135-136.

After the decision in this case there was enacted § 1(3) of the Interstate Commerce Act, providing that "The term 'transportation' as used in this chapter shall include . . . all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, . . . storage, and handling

of property transported . . ." 36 Stat. 539, 545, 49 U. S. C. § 1(3)(a).

After the enactment of § 1(3), this Court decided *Adams* v. *Mills*, 286 U. S. 397, which arose before the enactment of § 15(5), set forth below. The propriety of an additional charge for the unloading of livestock at the Chicago Union Stock Yards was in issue, and it was said: "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311." *Id.* at 409-410.

On February 28, 1920, prior to this decision and during the pendency of the controversy which led to it, there was enacted § 15(5) of the Interstate Commerce Act, which provided that: "Transportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." 41 Stat. 456, 486, 49 U. S. C. § 15(5).

In the subsequent case of *Atchison Ry. Co.* v. *United States*, 295 U. S. 193, it was pointed out that in appropriate circumstances the Commission might properly find that the carriers' duty to deliver livestock ended with delivery into suitable pens at the Chicago Union Stock Yards, and it was recognized that the question of where the carrier's obligation ends is for the administrative judgment of the Interstate Commerce Commission.

Our most recent decision bearing on the Commission's power to determine when transportation ends with reference to shipments of livestock to the Chicago Union Stock Yards is *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, rendered in the controversy over the propriety of yardage charges made in circumstances precisely similar to those of the present case, by virtue of which Armour & Co. intervened in the present litigation. There it was held by a unanimous Court that Armour's complaint in the federal District Court should be dismissed since primary jurisdiction was lodged in the Interstate Commerce Commission; and it was said that the facts alleged in the complaint revealed that "there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock." *Id.* at 200. By way of illustration the opinion detailed several questions which would arise, and among them was the following: "At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases." *Ibid.* The decision agreed with the view of the railroads and courts below that "adjudication of the issues presented relates to such complex transportation problems that determination of the legal questions must necessarily be preceded by the consideration of extensive evidence in a specialized field, and that decision of such questions is by statute vested exclusively in the Interstate Commerce Commission." *Id.* at 197. Finally, it was said that "If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate

determination of which is committed to the jurisdiction of the Interstate Commerce Commission. And before such long-standing transportation customs can be held illegal, it is of course necessary that evidence be heard." *Id.* at 200-201.

Thus it is seen that before the enactment of § 15(5), whether transportation included unloading was a question of fact for the determination of the Commission. *Adams* v. *Mills, supra.* Section 15(5) changed this, but it did not alter the situation with respect to yardage services, *Atchison Ry. Co.* v. *United States, supra*; and whether they are included in transportation is therefore a question to be decided by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law as contended by the appellants. *Atchison Ry. Co.* v. *United States, supra*; *Armour & Co.* v. *Alton R. Co., supra.* Otherwise we erred in requiring "primary resort" to the Commission in the *Armour* case with respect to the question where transportation ended. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. The propriety of the yardage charges in the present case was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law.

II.

In determining whether the Yard Company's unloading pens were suitable points at which to terminate the duties of carriers to consignees and points where the consignees entered into a relationship with someone other than the carriers, the Commission was justified in considering as it did all that would account for the evolution of the practice complained of as well as the effect of existing and proposed practices on the interest of the carriers, the public, and other shippers. *Adams* v. *Mills, supra,* at 409 *et seq.*; *Atchison Ry. Co.* v. *United States, supra,* at 198 *et seq.*; *Armour & Co.* v. *Alton R. Co., supra,* at 201. Neither the railroads nor the Stock Yards exist for the benefit of the packers alone. Their patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they entitled to facilities or treatment that will ignore the existence of other interests. The Stock Yards are not only a facility for the transportation of direct shipments from points of country origin to the packers; they also are an important factor in the entire animal industry of the United States. The Commis-

sion found that the direct shipments of livestock transported by rail to the packers at Chicago have exceeded 30,000 carloads annually for several years, but that the total annual average rail movement to the Stock Yards was 94,629 carloads.

The bulk of the movement of stock is received in the Yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between three and eight in the morning. In some instances immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the Yards. Apart from the direct shipments, much of this stock must be watered, fed, and weighed in the Yards. It is removed to holding pens and one of the important functions of the Stock Yards is to furnish the facilities for marketing. Commission brokers or market agencies receive consignments of livestock and sell them for the account of the producer, sometimes to the packers and sometimes to purchasers who require re-shipment.

Shipments must be moved with great rapidity and order, and it may be that this can best be done by employees under a single management and discipline. The customary handling over many years led to the building up of a physical plant which the Commission finds makes it physically impossible to remove this stock from the unloading pens except by use of the property of the Yard Company.

The interests of the public and of the community are entitled to consideration. This transportation is of a special kind of property on the hoof which calls for special handling in the interests of economy, safety, sanitation, and health. The Commission has found that "the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago."[6]

The existence and suitability of alternative facilities for delivery of livestock were considered by the Commission. Some stock is and can be delivered at team tracks and some at industrial sidings. These facilities are inadequate for handling the entire volume of direct shipments. It does not appear, however, that the existence or adequacy of alternative facilities for delivery at other points is particularly important in the case, because the

[6] 238 I. C. C. 179, 194.

shipments involved are consigned to the packers at the Union Stock Yards by their own choice. It does not appear that they are demanding an increase of other facilities, and the case has not been considered in that light.

The packers object to consideration of their own part in evolving the situation of which they complain. The Commission, however, considered it and made findings as to the history of the relation between the Yard Company and the packers.

The Commission found that since the Yard Company began operation in 1865 there has been a line of demarkation between the services which shippers were entitled to receive for the transportation charges and the services received from the Yard Company. The line-haul carriers have paid the Yard Company for the unloading service and absorbed the charge made for such service out of their line-haul rates. From the beginning, however, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded. Dealings with respect to those charges were between the Yard Company and the shippers, with no intervention by the carriers. After these practices had been in effect for about twenty-five years, the Yard Company entered into certain arrangements under which these packers participated in the profits from its operations. Some time before 1890, the packers threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. The packers had acquired a large tract of land in Indiana as a site for their proposed plants. They had also purchased property known as the "Central Stock Yards" near the Union Stock Yards and had erected thereon platforms, pens, sheds, and sidings for the purpose of receiving all cattle and livestock consigned to them. They had also filed a complaint in an Illinois court demanding that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the packers' Central Stock Yards.

Having put themselves in this independent position and threatened to reduce the revenues of the Yard Company, the packers negotiated a contract which in substance involved the abandonment by the packing companies of this threatened move to Indiana and surrender of their own facilities for receiving direct shipments in return for a participation in the profits and capital of the Yard Company. In 1892, the packers conveyed to Stock Yard interests the Indiana site and the Central Stock Yards, and

agreed by contract to dismiss the suit filed in the Illinois court and to refrain from filing any similar suit for a period of fifteen years; to continue their business at Packingtown adjacent to the Union Stock Yards for fifteen years from July 1, 1891; to have all livestock slaughtered by them on their premises or within two hundred miles of the City of Chicago during such period pass through and use the Union Stock Yards, and to pay the usual yardage charge therefor; and they guaranteed that the Yard Company would receive and collect from its yardage charges on packers' livestock the aggregate sum of $2,000,000 within six years, and agreed to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its business in Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The packers received income bonds of a new corporation, the security of which was the revenues of the Stock Yards, in the amount of $3,000,000. Swift received approximately one-third. These bonds were subsequently redeemed by the issuing corporation.

The railroad companies were not parties to this agreement, and the Commission found that the packers at the time the agreement was entered into did not consider the assessment of the yardage charges to be a matter of any concern to the railroads. During the existence of the agreement described, the packers paid the yardage charges, and participated in the receipts from such charges. This agreement expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. It appears, however, that after the expiration of the contract the Yard interests were informed that the packers were still threatening to move their plant from Chicago, and it appears that Swift expected to receive a share of the Yard's earnings at late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. J. O. Armour, of Armour & Company, however, received substantial benefits after 1907.

Thus, for more than seventy years the responsibility of the railroads in respect of direct shipments consigned to the packers has ended with the unloading service. The packers from that

point on have negotiated their own arrangement with the Yard Company. More recently, of course, the Stock Yards have passed under public regulation, and discrimination or rebating of the kind once practiced is no longer possible. The Commission finds that it was the attitude of the packers that their patronage was a thing of value to the Stock Yards and they proposed to sell that patronage to the Yard Company. The Packers and Stockyards Act having made private arrangements of this kind unlawful,[7] the packers now contend that the carriers must protect them against yardage charges on their direct shipments.

It was the packers themselves who suppressed the competitive yards and alternative facilities for unloading their stock. The Commission, however, has not held the packers to be estopped by their conduct. It has only considered the practice and usage of the packers as bearing on the suitability of the Yard Company's unloading pens as a point of termination of the carriers' responsibility. The Commission has held it to be a reasonable practice that the railroads' responsibility for transportation of such direct shipment consigned by the packers to themselves at the Union Stock Yards ends with unloading into the unloading pens, which it found to be suitable, and that the carriers' failure to negotiate or purchase free egress for such shipments from the unloading pens has not resulted and does not result in an unreasonable practice. There is evidence to support the determination, and the decision of the administrative body charged with making it is therefore conclusive on this Court.[8]

III.

Having properly decided that transportation ended when the livestock reached the unloading pens, was the Commission in error in concluding that it had no jurisdiction to inquire into the reasonableness of practices or charges of the Yard Company beyond that point?

The appellants contend that the fact that property of the Yard Company was involved in furnishing egress to the appellants' shipments did not prevent the Commission from exercising such jurisdiction. The Yard Company, they say, was the agent of the

[7] 42 Stat. 161, 7 U. S. C. § 192.

[8] Adams *v.* Mills, *supra*; Atchison Ry. Co. *v.* United States, *supra*; Armour & Co. *v.* Alton R. Co., *supra*.

railroads and acted in a dual capacity as public stockyards subject to the Packers and Stockyards Act and also as a common carrier by railroad subject to the Interstate Commerce Act. In the latter capacity, it is said, the Yard Company as the railroads' agent provides terminal facilities for livestock delivery which is a part of the railroads' obligation.

The Stock Yards are named in the railroads' tariffs as a specific station to which the railroad rates to Chicago are applicable. The line-haul railroads publish an allowance to the Yard Company of $1.25 per single-deck car and $1.50 per double-deck car for unloading livestock. The Yard Company also files with the Interstate Commerce Commission its tariff which publishes the same amounts as charges for unloading the livestock "as carrier's agent." Since unloading is required by statute as a part of the transportation service, the filing of the terms on which it is performed is manifestly proper, although shippers are not concerned with the charge because the railroads absorb it in the line-haul rate. Because the Yard Company in this specific and limited matter acts as agent for the railroads and in the performance of that transportation service is subject to the jurisdiction of the Interstate Commerce Commission, it does not follow that the Commission may regulate either directly or somehow through the railroads, the other practices and charges of the Yard Company.

If the Yard Company is in the dual position of being at once the agent of the carriers for the unloading of the stock and the principal in rendering any subsequent services, so is it under dual regulatory schemes and authorities. In so far as it is an agency in transportation, it is subject to the Interstate Commerce Act and to the control of the Interstate Commerce Commission. In so far as it performs stockyard services, it is subject to the Packers and Stockyards Act and to the regulation of the Secretary of Agriculture. The statutes clearly disclose an intention that jurisdiction of the Secretary of Agriculture over stockyard services shall not overlap that of the Commission over transportation.[9] The boundary between the two is the place where transportation ends, and in this case that is established to be the unloading pens.

[9] Section 406 of the Packers and Stockyards Act provides in part: "Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." 42 Stat. 169, 7 U. S. C. § 226.

The Union Stock Yards are a public utility. The decision of the Commission that the transportation ends with unloading leaves the stock in the hands of a public utility—the Union Stock Yards—for delivery to the consignee. Neither the Interstate Commerce Commission nor this Court can assume that the charges or practices of that utility are unfair or unreasonable, that it is charging for services that are not performed or facilities not used, or that it is imposing on consignees unnecessary services. Nor can the Commission or this Court assume that if unreasonable practices or charges are imposed by this utility the Secretary of Agriculture would fail to correct them upon an appropriate complaint in a proceeding to which the Yard Company is a party and may defend its practices for itself. In any event, Congress has provided that the Secretary of Agriculture is the forum in which such charges and practices may be questioned and may be weighed in the interest, not only of the packers, but of others who use the Yards and markets and who might be affected competitively by granting the packers' present demands. Congress has established an appropriate forum in which any complaint of the packers against the real party in interest may be heard and any lawful grievances adjusted, and the Commission was quite right in refusing to trespass upon its jurisdiction.

It follows that the decree below should be and hereby is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

595.—October Term, 1941.

Swift and Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, et al. } Appeal from the District Court of the United States for the Northern District of Illinois.

[May 4, 1942.]

Mr. Justice Douglas, dissenting.

The question in this case is not where the transportation ends but what the particular transportation service includes. I do not suppose that it would be contended that a railroad could lawfully exact from a passenger who had alighted on the station platform an extra charge for passing through the station to the street. The reason why it could not make that exaction is that although the transportation ended at the platform, the transportation service included free egress from the station. I think that that principle is applicable and controlling here.

Covington Stock-Yards Co. v. *Keith*, 139 U. S. 128, which arose prior to the Interstate Commerce Act, applied that principle to the delivery of livestock at stockyards. This Court after stating that a carrier of livestock has no right "to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself", added (pp. 135-136): "If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of livestock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."

So far as I am aware the *Covington* case has never been overruled. As recently as 1939 we approved it. For we stated in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 219, after reviewing §§ 1(3) and 15(5) of the Interstate Commerce Act: "Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for load-

ing onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136. The same rule has been repeatedly applied since the statute was adopted. *Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 198, and cases cited; *Denver Union Stock Yard Co* v. *United States*, 304 U. S. 470; 2 Hutchison, Carriers, 3d ed. § 510."

Atchison, T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193, did not alter that rule. As stated by the majority in that case (295 U. S. p. 200): "The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant. Consignee sought free delivery in cars switched into its plant, but the Commission found the switching charge not unreasonable. Consignee also sought free use of the Yards Company's properties, including the overhead runway to take its animals from holding pens as well as from unloading pens to its plant." And the majority added (p. 201): "Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways. Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose." Although certain general statements in the opinion are not consistent with the rule of the *Covington* case, a unanimous Court recently explained *Atchison, T. & S. F. Ry. Co.* v. *United States* as follows: "There the Commission's order directing the discontinuance of appellant's yardage charge to consignees was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish." *Union Stock Yards Co.* v. *United States, supra*, p. 219. That is amply supported by the reasons given by the majority itself for setting aside the Commission's order in the *Atchison* case: "But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search

the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order." 295 U. S. pp. 201-202. And *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195 did not weaken the rule of the *Covington* case. We merely held in that case that the complaint of a packer who sought to be rid of "yardage charges" raised certain administrative problems necessitating primary resort to the Interstate Commerce Commission. We did not reach in that case the merits of that controversy nor the questions of law involved here.[1]

Hence, I think we reach the question of the application of the rule of the *Covington* case to this situation unembarrassed by a prior holding.

I do not agree that Congress has left to the Commission the power to eliminate free egress from this particular transportation service. Whatever may have been the scope of the authority of the Commission prior to the Transportation Act of 1920 (*Adams* v. *Mills*, 286 U. S. 397), it should be noted that Mr. Justice Brandeis, the author of *Adams* v. *Mills*, joined in the dissenting opinion in the *Atchison* which repudiated the notion that the transportation service in this type of shipment was completed at the unloading pens. Furthermore, as stated in the dissenting opinion in the *Atchison* case, it is clear that Congress itself provided a rule in § 15(5) of that Act which placed on the Commission the duty and the authority to see to it that tribute was not exacted from a shipper by exaction of a separate charge for egress from the station to the street or other public place. 41 Stat. 456, 486, 49 U. S. C. §15(5). That section so far as material here provides that transportation wholly by railroad of ordinary livestock in carload lots received at public stockyards "shall include all neces-

[1] It will not do to say that if the rule of the *Covington* case applied we erred in requiring primary resort to the Commission in the *Armour* case. There were several questions relating to complex transportations involved in that case which required primary determination by the Commission. They included possible readjustments of rate schedules, possible refunds to shippers, and definition of the boundaries of the station named in the tariff. The statement in the *Armour* case that the statute did not mark the point where the transportation service was completed "under all circumstances and conditions and in all cases" (312 U. S. p. 200) is borne out by the *Atchison* case where the consignee, as we have noted, sought free delivery in cars switched into its plant and the use of an overhead runway from holding pens to its plant. Clearly a determination of the precise facts concerning the characteristics and use of a particular station was necessary before a correct application of the applicable rule of law could be made.

sary service of unloading and . . . delivery at public stockyards of inbound shipments into suitable pens . . . without extra charge therefor to the shipper, consignee, or owner . . . ." To say that carriers need not furnish facilities for delivery and immediate removal of livestock by the consignee without extra charge is to give § 15(5) an interpretation which is not only "ingenious" (*Atchison, T. & S. F. Ry. Co.* v. *United States, supra*, p. 205, dissenting opinion) but which is also quite oblivious of the crying abuses which § 15(5) was designed to correct. The words "all necessary service of unloading and . . . delivery" of livestock at public stockyards must be taken to include all services at a terminal incidental to obtaining delivery of the livestock. And delivery "into suitable pens" must be taken "to mean pens to which the consignees may gain unimpeded access for the purpose of removing their stock". *Id.*, p. 206. As stated by Commissioner Eastman in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, 559, pens are not "suitable" within the meaning of § 15(5) where they do not "permit of reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival." Otherwise the purpose of § 15(5) in removing "an old evil" is defeated and "a crop of new ones" is sanctioned "by giving stock yards and rail carriers of livestock *carte blanche* to impose vexatious charges which for more than thirty years had been condemned by this Court." *Atchison, T. & S. F. Ry. Co.* v. *United States, supra*, p. 206, dissenting opinion.

The legislative history of § 15(5) was reviewed in the dissenting opinion in the *Atchison* case. 295 U. S. at pp. 207-208. The mandate contained in § 15(5) originated with the American National Live Stock Association (59 Cong. Rec. 674) and the National Live Stock Shippers' League. Hearings, Committee on Interstate and Foreign Commerce, H. R. 4378, 66th Cong., 1st Sess., Vol. I, pp. 139-141. The proposal was not vague. It was that there be "one through rate on live stock for the whole services from point of origin to the destination at public stockyards used at market place which shall include unloading into suitable pens and delivery therein at such stockyards, where the animals may be counted and checked, including such facilities as are necessary or in use for making such delivery". *Id.*, p. 141. It was the enactment of the rule of the *Covington* case which was specifically asked. *Id.*, p. 874. The argument was that a railroad would not

make two rates to its own pens if it owned and operated them, and neither should it do so with respect to pens which it uses in the same manner. There should be one fare, the same as a passenger rate, to such depot as they use in a given city." *Id.*, p. 881. The record shows that Congress was alive to the evils of which the shippers complained and that it endeavored to correct them. As stated by the House Managers the aim of the amendment introduced in the Senate and amplified in Conference was to provide that the "through rates on live stock should include unloading and other incidental charges." 59 Cong. Rec. 3264. Indeed the sole purpose of the amendment was to impose on the Commission the duty and authority to eliminate the practices condemned by the *Covington* case. In view of that explicit history it comes as a surprise that the Commission can now abdicate and say that a consignee or owner who has paid a through rate may not have free receipt of his stock at the station. To hold that the separate charge for unloading livestock into pens which § 15(5) outlawed may now be exacted for taking the livestock out is to make the relief afforded by that section illusory indeed.

But it is said that the matter is subject to the Packers and Stockyards Act of 1921 and that if relief is to be had, the Secretary of Agriculture must give it. The difficulty with that view is that that Act provides, "Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." 42 Stat. 169, 7 U. S. C. § 226. The boundary between the Commission and the Secretary of Agriculture is not the place where the transportation ends but the time when the transportation service is completed. It is not completed until the consignee has unimpeded access to the station for the purpose of removing the livestock. That view is supported by *Union Stock Yard Co.* v. *United States, supra*, where the stockyards argued that their loading and unloading services were subject to regulation by the Secretary of Agriculture and not by the Commission. We held that loading and unloading services were "common carrier services placed under the authority of the Commission by the Interstate Commerce Act." 308 U. S. p. 221. And we defined the scope of those services in terms of the rule of the *Covington* case. *Id.*, p. 219. To call the withholding of the stock until an additional fee is paid, a stockyard "service" is indeed incongruous. It is to forget over half a century of history. It is to take away

part of the protection which Congress afforded shippers by § 15(5). It is to interpret § 15(5) not liberally as a remedial provision but strictly against the stock raisers for whose ultimate benefit it was passed. For years the carriers and stockyards persistently sought to dignify this type of tribute and exploitation as a "stock yard service". Until the present they were unsuccessful. They should fail again. The *Covington* case states the correct rule. It is that rule which Congress enacted into § 15(5) for the protection of the stock raisers who ultimately pay the tribute and vexatious charges which the middle man exacts. It is that rule which we should enforce until Congress changes it.

The Interstate Commerce Commission followed that rule in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553. That case met with reversal here. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.* And the opinion of the Court contained a *dictum* that "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by § 15(5)." 295 U. S. p. 201. It is that *dictum* which has haunted this litigation and which largely shaped the ruling of the Commission in the instant case. For the Commission proceeded from the premise that there was "no difference in principle" between the *Atchison* case and this one and that this Court had stated in the earlier case "that the obligation of the line-haul carriers ceased when the animals were placed in the unloading pens." 238 I. C. C. 179, 189-190, 196. But the Commission was under no such compulsion. Commissioner Alldredge was quite right when he pointed out in his dissenting opinion that the Commission misconstrued the opinion of this Court in the *Atchison* case. 238 I. C. C. pp. 197-198. Hence the conclusion of the Commission reached in large measure under the compulsion of that erroneous assumption should not be given the weight normally due findings and conclusions of such an expert body.

We should reaffirm once more the rule of the *Covington* case and reject the *dictum* in the *Atchison* case. We should hold that § 15(5) is remedial and should be liberally construed and, as the Commission itself held in the *Atchison* case, that this particular transportation service includes the time-honored opportunity of the consignee or owner to go to the station and take away his livestock without payment of an additional toll.

The CHIEF JUSTICE and Mr. Justice MURPHY join in this dissent.